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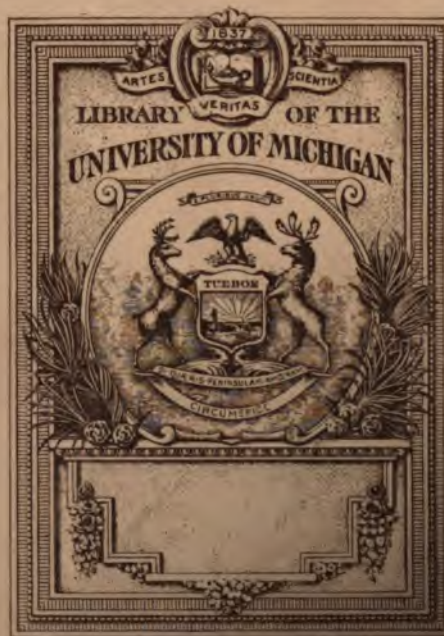
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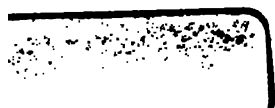
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# INTERNATIONAL LAW



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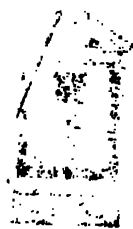




*Lord Stowell.*

THE  
**F. L. CAMPBELL**  
 - M.D. -  
 AND HIS WIFE

THE  
 - M.D. -  
 AND HIS WIFE



THE  
 - M.D. -  
 AND HIS WIFE



# INTERNATIONAL LAW

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WARDEN OF MERTON COLLEGE, OXFORD  
IN RECOLLECTION OF MANY GREAT KINDNESSES  
THIS LITTLE BOOK IS GRATEFULLY  
DEDICATED

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## PREFACE TO FIRST EDITION

IN writing this little book I have continually referred to the works of Phillimore, Wheaton, Kent, Manning, Lorimer and Halleck, but my obligations have been greatest to the late Mr. W. E. Hall, and the late Mr. Dana, both of whom brought to the study of International Law extensive learning and remarkable common sense. Among living writers I must mention with grateful appreciation Professor Westlake of Cambridge, and Professor Holland, whose lectures I had the opportunity of attending at Oxford. Both these gentlemen have done much by their assiduous attention to the great questions of the day to keep alive the tradition that Professors of International Law shall also be men of affairs. I have read with profit the brightly-written book of Mr. T. G. Lawrence, the very learned researches of Mr. T. A. Walker, and the judicious articles by Mr. Barclay in the *Encyclopedia of English Law*. My thanks are particularly due to my friends, Mr. E. G. Hemmerde and Mr. Leslie Scott, both of the Inner Temple, for reading through the proof-sheets, and for some useful suggestions.

It will be noticed that I have given numerous extracts from the judgments of Lord Stowell in that portion of the work which deals with neutrality. It did not appear to me that the attempt to paraphrase them would add either to the authority or attractiveness of my book.

In attempting to treat the vast subject of International Law within the compass of less than two hundred pages,

I cannot hope to have avoided inaccuracies, omissions, and, above all, a dogmatism of style which is not unlikely to irritate. On the other hand, I have made an honest attempt to see and state the Practice of Nations as it is, and I am not altogether without hope that this manual may be of use to students, politicians and men of business who cannot spare time to read the infinitely more useful treatises to which I am so much indebted.

F. E. SMITH.

10 COOK STREET,  
LIVERPOOL.

### PREFACE TO FOURTH EDITION

SINCE the first appearance of this book in 1900 the doctrines of International Law have passed through a period of development. The Hague Tribunal was then in its infancy, and as yet untried. A series of cases of more or less importance has fully justified its creation, and shown even to the most sceptical the advantage of having an organisation for the settlement of disputes ready to hand; and even the important reservation of 'honour and vital interests,' though strenuously insisted upon in negotiations and discussion, has shown a tendency to fall into the background when put to the test of practical experience. It has, therefore, been necessary to develop more fully the chapters relative to the Hague Conferences and International Arbitration; and it is hoped that the summary of the cases already decided will

provide a useful bird's-eye view of the progress which the last ten years have shown in the principle of the amicable settlement of international disputes.

But a greater extension of the size and scope of this book has been made necessary by the Hague Conventions of 1907 and the Declaration of London of 1909. The Declaration and several of the Conventions are at present unratified, and the fate of the International Prize Court in particular stands in some doubt. But whether these important international agreements become effective or not, no treatise on International Law can in future ignore them. We have attempted to deal with the subject without entering into the controversy which is at present having the beneficial effect of diffusing a little light, though perhaps rather more heat, on some of the elementary principles of the relations between states; in fact, the book was practically written before that controversy broke out. For convenience, however, we have added in an Appendix a short statement of the cases for and against the Declaration in so far as they can be shortly stated. It may be noted here, however, that the result of the refusal of this country to ratify the Declaration is a matter of some doubt. Sometimes important agreements (such as the Declaration of Brussels of 1874, and the Declaration of Paris of 1856) have been generally acted upon though not universally ratified, and the few powers who hold out usually after a lapse of time fall into line; but it seems by no means certain that a definite refusal to accept such a document as the Declaration of London will not leave that document a monument not of what the law is but of what the law is not. Whether this would be an advantage or a disadvantage to this country must be left to the reader to



decide after considering the terms of the Declaration in its relation to the existing law.

Beyond this it has been necessary to include a great deal of agreed law contained in the Conventions of 1907, about which there is little dispute. The rules of war have been worked out in more detail, and the position of neutrals more clearly defined: an attempt, as yet but in its early stages, has been made to settle the question of submarine mines; the principles of the Geneva Convention have been applied to maritime war, and the Convention itself has been extended and amended; and, to speak generally, the writer on International Law has now a series of definite codes of law to work upon more comprehensive and more complete than anything which was thought possible ten years ago.

F. E. S.  
J. W.

4 ELM COURT, TEMPLE,  
*April* 1911.

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<sup>1</sup> This Blue book should be referred to throughout all the passages relative to the Declaration of London. It has not been thought necessary to refer to it specifically when quoting each article.





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# INTERNATIONAL LAW

## INTRODUCTORY CHAPTER

1. BY International Law is meant the rules acknowledged by the general body of civilised independent states to be binding upon them in their mutual relations. In a form more or less rudimentary we may suppose such rules to have existed almost from the infancy of society, for national isolation or recognition of international rights and duties must always have been necessary alternatives. Small indeed was the area covered by these rough-and-ready conventions, and when a new rule was added to the code, it sprang from the imperious promptings of mutual convenience or mutual safety. The sanctity conceded by ancient sentiment to the office of herald supplies a well-known instance of this class of rules. The duty of respect to this office is insisted on in the Homeric poems, and when the people of Ammon sent back David's ambassadors<sup>1</sup> without one side of their beards, it was felt that the limits of international outrage had been reached. We must not trace in the immunity of envoys the germs of a nascent humanity: it was an immunity involved in the necessity of international intercourse. Outrages would naturally have been followed by reprisals, until the calling of a herald gradually ceased to attract. The constitution of ancient societies was little favourable to the development of a systematic body of rules. Since states are its units, international law can only exist where a number of communities acknowledge a mutual equality before the law and make common submission to its authority. Such a body of rules

<sup>1</sup> 2 Samuel x. 4.

was faintly conceived of among the Greek City States where national conduct was defended and attacked by a reference to

τὰ τῶν Ἑλλήνων νόμιμα τὰ πρὸς τοὺς Ἕλληνας δίκαια.<sup>1</sup>—

No doubt these νόμιμα were consolidated by pride in Hellenic nationality and the abhorrence of savage practice,<sup>2</sup> but the Greek mind with all its immense intellectual subtlety was never a legal mind; the area over which the interstate customs extended was curiously partial and arbitrary, and the sanction on which they uncertainly depended was really the sentiment of *noblesse oblige*.

Italy.

2. Turning to the early history of the Italian cities we find in the *jus fetiale* the elements of a system whence international law might have ultimately sprung, if the growth of Imperial Rome had permitted the survival of independent communities. The formulæ preserved by Livy<sup>3</sup> suggest that the Pater Patratus, or spokesman of the diplomatic school, was a functionary found in each considerable Italian community. It is a fair assumption from the materials before us that international disputes were ceremoniously discussed between the fetial colleges of the states involved, with a view to settlement on established principles.

Modern International Law.

3. The analogies furnished by ancient society are too precarious for further examination here, and we pass hurriedly on to the birth of modern international law. The opportunity came with the break-up of the Roman empire into independent states, but a period of darkness immediately followed, little favourable to the evolution of legal principles. Alike in Eastern and Western Europe men were waging desperate wars, the bloody records of which were to be the authorities of Ayala and Gentilis. These two writers appeared almost together towards the close of the sixteenth century; their views are often confused and sometimes absurd; they are deficient alike in the sense of proportion, and the faculty of discrimination, but their publication none the less marks an immense advance in international morality. Now for the first time it was boldly affirmed that the conduct

<sup>1</sup> The laws of Hellas: the rights which Hellenes may exact from one another.

<sup>2</sup> Cum barbaris æternum . . . bellum Græcis est.—Livy, xxxi. 29.

<sup>3</sup> Livy, Book i. 32.



of states should be controlled by legal rules. The code was a ruthless one, but the alternative was complete lawlessness. Immeasurably greater than these two writers on the constructive and critical side was their successor, Hugo Grotius, who was born in 1583, the year after Ayala's work was published. It would be hard to mention any writer in any field of literature who has more profoundly influenced the course of human history. Grotius was no specialist. Law, theology,<sup>1</sup> politics, scholarship—all at different times engaged his marvellously facile pen; but the publication of his famous work, *De Jure Belli et Pacis*, showed that a clear and original thinker was devoting his great intellect and unrivalled learning to the infant science of international law. It may be imagined that Grotius and his predecessors did not find ready-made the principles on which their science was to rest. No doubt there were precedents, but they were mostly of a kind to be evaded, and a treatise on international law, which derived its rules of war from the belligerent records of the preceding centuries, would have been a qualified blessing to humanity.

4. The labours of Ayala, of Gentilis, and of Grotius could never have produced results so great had they not been associated with a conception which has, perhaps, caused more loose thinking than any other in the history of thought—that of the law of nature. In its origin this phrase denoted simply those universally received rules of morality which deal with the external actions of men.<sup>2</sup> In this sense the occasional contrast between natural law and positive law is familiar enough in Greek tragedy and elsewhere. Many

<sup>1</sup> 'I would recommend to every man whose faith is yet unsettled Grotius, Dr. Pearson, and Dr. Clarke.'—Dr. Johnson. See Croker's *Boswell*, vol. i. p. 171.

<sup>2</sup> See Holland, *Jurisprudence*, ed. 3, pp. 28-35; and Maine, *Ancient Law*, ch. iii. and iv.

See Austin, *Province of Jurisprudence Determined*, Lecture 1.

Cf. also the description of natural law given by Grotius with the passage following it from Aristotle:—

Grotius i. 1.—*Dictatum rectæ rationis indicans actui alicui ex ejus convenientia aut disconvenientia cum ipsa natura rationali ac sociali, inesse moralem turpitudinem aut necessitatem moralem, ac consequenter ab auctore naturæ Deo aut vetari aut præcipi.*

Arist., *Nic. Eth.* v. 7:—

Τοῦ δὲ πολιτικοῦ δικαίου τὸ μὲν φυσικὸν ἐστὶ, τὸ δὲ νομικόν, φυσικὸν μὲν τὸ πανταχοῦ τὴν αὐτὴν ἔχον δυνάμιν, καὶ οὐ τῷ δοκεῖν ἢ μὴ, νομικὸν δὲ ὃ ἐξ ἀρχῆς μὲν οὐθὲν διαφέρει οὕτως ἢ ἄλλως, ὅταν δὲ θῶνται διαφέρει.

Law of Nature. things are shocking to morality which it is not convenient to pronounce illegal. Conversely many laws may be broken, for instance such as deal with *mala prohibita* rather than *mala per se*, without any violation of the moral law. None but a sensitive conscience will be shocked because a friend rides his bicycle on the pavement in a lonely place where the road is bad. The modern use of the expression 'law of nature' does not differ greatly from the earliest. Thus Sir Frederick Pollock writes:—'By the ethical school I mean . . . those authors who throw their main strength in investigating the universal moral and social conditions of government and laws, or at any rate civilised government and laws, and expounding what such governments and laws are, or ought to be, so far as determined by conformity to these conditions. This is the nearest account I can give in few words of what is implied in modern usage by the terms law of nature, *droit naturel* or *Naturrecht*.'<sup>1</sup> To this account it must perhaps be added that 'law of nature' in modern usage expresses those rules of morality by which the outward acts of man are tested, whether their area be co-extensive with or larger than that of positive law. But it was neither in its earlier nor its modern use that the law of nature exercised an influence so profound over international law. To understand that influence, a brief reference must be made to the law of nature as it figured in the Stoic philosophy. In the Cosmogony of Zeno the law of nature indicated the physical rules which determined the dependence of the universe upon the evolution of *πρῶτα* or primitive substance.<sup>2</sup> When Stoicism became a fashionable creed in Rome, the popular mind was most vividly impressed by the simplicity which distinguished its votaries in an age of growing luxury. Soon arose a picture, ideally attractive, of a natural state of society to which the artificiality of a perverse age had been happily unknown. The society was conceived of as controlled by rules of transcendent because spontaneous justice, and to these rules the familiar description 'law of nature' was applied.

<sup>1</sup> *History of Science of Politics*, p. 110.

<sup>2</sup> Cf. Verg., *Æn.* vi. 724 :—

Principio cælum ac terras camposque liquentes,  
Lucentemque globum Lunæ Titaniaque astra  
Spiritus intus alit, totamque infusa per artus  
Mens agitat molem, et magno se corpore miscet.



Under another name this law of nature was to play an Law of Nature incalculable part in the development of the law of Rome. The exclusive jealousy of the foreigner, which is so characteristic of ancient societies, had closed the door of the *jus civile*, or native Roman law, to alien residents. To adjust disputes when one of the parties was an alien, the Prætor had pieced together a body of rules drawn collatively from the communities which lined the Mediterranean sea-board. To these rules was given, by reference to their source, the name *jus gentium*, or law of nations. In its origin it was despised as an inferior system having no part in the ceremonious observances which distinguished the indigenous code. In fact, it soon became the source from which a wealth of equitable principle was obliquely infused into the Roman system, through the sympathetic medium of the Prætor's edict. It was inevitable that sooner or later Roman common-sense should apply the standard of convenience to the two distinct streams of which Roman jurisprudence was to be the splendid confluence; but the process was no doubt hastened by the increasing vogue of Stoic simplicity. It would be too long to recount here the various steps which preceded the recognition that the *jus civile* fell far short of the 'natural' standard which its cosmopolitan rival seldom failed to satisfy.<sup>1</sup> It is sufficient to say that by the time of Justinian the law of nature and the law of nations were commonly identified. We are now in a position to understand the part which these conceptions played in the success of Grotius. He addressed an audience which demanded nothing more than a stable principle, on which to construct the jural relations of states. To readers full of the mediæval respect for authority, the voice of Grotius would have been the voice of one crying in the wilderness, if he had prescribed or forbidden conduct by outspoken reference to the standard of moral right and moral wrong. But the matter assumed a different aspect when rules, which recommended themselves by a novel humanity, were further affiliated on the respectable authority of nature's law. To this result the later Roman identification of the law of nature and the law of nations materially contributed. The subject of Grotius' treatise was commonly and conveniently

<sup>1</sup> Maine, *Ancient Law*, p. 52, ed. 14. See also Moyle, *Justinian*, ed. 3, Introduction, p. 36.



Law of Nature

described as the law of nations: if then the law of nations was the law of nature, it followed that the relations of states must be governed by the laws of nature. Through this loophole men gradually infused into the practice of war the restraining influence of a humaner morality. In another way the confusion between *jus gentium* and the dawning science produced results of far-reaching importance. It led to the wholesale introduction into international law of the highly refined conceptions of Roman jurisprudence. As Sir Henry Maine<sup>1</sup> has expressed it, 'Setting aside the conventional or treaty law of nations, it is surprising how large a part of the system is made up of pure Roman law. Whenever there is a doctrine of the jurists affirmed by them to be in harmony with the *jus gentium*, the publicists have found a reason for borrowing it, however plainly it may bear the marks of a distinctly Roman origin.'

5. The danger is manifest enough of basing international law on a body of rules so little determinable as the precepts of nature. Between the moral and the immoral there is a shadowy border-line—a Debatable Land—which has long been the battlefield of ethical writers. If men are not agreed on the points which natural law allows or disallows, there will be as many standards of law as there are commentators. This confusion has thrown much undeserved discredit upon international law. Many writers in dealing with concrete matters of controversy have appealed to the law of nature in the terms appropriate to an English barrister who hands up to the court a recent decision in the House of Lords. An esteemed French writer<sup>2</sup> applies the 'natural' standard to one triviality after another with complacent regularity, and thus reinforced makes short work of terrestrial precedents. So abused, the law of nature becomes a subtle and disingenuous pretext for dogmatism.

Law of Nature  
in Modern  
Times.

6. It may be asked, What is the real relation of the so-called law of nature to the international law of to-day? A study of diplomatic correspondence almost suggests the rule, 'When no other argument offers, try the "law of nature."' On principle it would seem that the law of nature is to international law exactly what it is to positive law. It cannot be cited to overrule the positive precepts of either, but

<sup>1</sup> *Ancient Law*, p. 97, ed. 14.

<sup>2</sup> Hautefeuille.

these precepts will, if possible, be construed consistently with the moral law. The influence of natural law is intangible; it is, so to speak, 'in the air,' colouring the views we take of positive law, but never to be cited in its teeth. What then are the principal materials with which international law is concerned? They are to be found in the various precedents from which the general practice of states in their mutual dealings is deducible. It deals with that practice as it is, and not, at least primarily, as it ought to be. Blackstone's *Commentaries* are one thing; Bentham's *Theory of Legislation* another. There have been too many Benthams in the history of international literature, and their failure to distinguish between what is and what ought to be has tended to discredit their real services.<sup>1</sup>

7. The present chapter seems the most convenient place to consider how far the practice of nations is properly described as legal. Is international law law at all? Lord Salisbury observed thirteen years ago that 'It can be enforced by no tribunal, and therefore to apply to it the phrase "law" is to some extent misleading.'<sup>2</sup> The late Mr. Austin, in his *Province of Jurisprudence Determined*, laid it down that international law rests merely on the support of public opinion, and cannot therefore be properly called law. The English Analytical School, of which Austin was the first and the greatest, is irretrievably committed to this doctrine. Putting on one side Austin's questionable inclusion in his scheme of the law of God, we find that he conceives of positive law as a command addressed to a political inferior by a political sovereign superior, acting as such, and followed by a sanction in the event of disobedience. This conception clearly excludes international law. It is proposed to consider how far the exclusion is academic, and how far it is supported by essential differences. The answer to these questions depends on the legitimate scope of the term 'law.' If the significance of this term be examined, two main characteristics strike the attention: (i) the uniformity of law; (ii) the compulsoriness of law. The use of the word has, so

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tional Law.

<sup>1</sup> Cf. Lord Salisbury's remark reported in the *Times* of July 26, 1897:—  
'International law . . . depends generally on the prejudices of the writers of text-books.'

<sup>2</sup> *Loc. cit.*



Meaning of  
"Law."

to speak, bifurcated, according as the attention has lingered on one or the other aspect. It is used to denote on the one hand the unvarying sequence of natural phenomena, and on the other hand the positive laws peremptorily imposed by a sovereign upon his subjects. By the expressions 'law of refraction' and 'law of gravitation' nothing is conveyed, as Professor Holland has well expressed it, but that rays are refracted and objects do gravitate. These latter uses are metaphorical and therefore unobjectionable. With international law the case stands otherwise. Either it does possess the essential characteristics of law, or it does not; if it does not, the very closeness of its resemblance thereto, the very legal complexion of its rules, makes it imperative to notice the chasm between them. It is by no means clear that the objections of Austin can be dismissed as pedantic. They are objections of an essentially practical kind. Take away from the meaning of 'law' its sanction—the evil in which society involves the lawbreaker—and you leave little that is characteristic of the word. What is the sanction of international law? That there is some punishment for the wrongdoer is clear, unless the wrong is done to a nation too weak to resist, or too little interested to make it worth while to incur the trouble of resistance. There is always a heavy penalty in money and in human life and suffering involved even in a successful war. When wars were lightly entered upon for personal or dynastic reasons, this consideration exercised but little restraining influence; but in proportion as the issues of peace and war pass from the hands of irresponsible individuals into those of responsible governments, and wars become more completely national and more destructive to trade and widespread in their effects, so will the fear of them operate to keep nations within the bounds of recognised international rules on an ever-growing class of subjects. The punishment of a nation which defies international law is vastly greater than that of an individual who breaks a moral though not a legal command; and with the development of the tendency, which has become very marked in the past few years, for nations to agree upon codes of rules of international law, an increasing number of those rules will pass into a region where in validity they will be scarcely distinguishable from the precepts of the strictest Austinian law, owing mainly

to the growing reluctance to face a war whenever a legal or quasi-legal decision offers a method of avoiding it without loss of prestige. If, for instance, the Hague Convention of 1907 establishing an International Prize Court, and the Declaration of London, which covers, with two or three important exceptions, the whole field of the relation of belligerents to neutral trade, are ratified,<sup>1</sup> the decisions of the proposed court may soon become in practice as binding as the command of an Austinian political superior with a police force at his back. That court will in fact be a political superior established by the nations over themselves with a power (within a strictly limited area) to command which from the very nature of the case will be equivalent to a power to enforce.

But though this may be in practice the case, yet in principle the commands of an International Prize Court will be backed by nothing more binding than the force of opinion and the voluntary acquiescence of the nations concerned: while in all matters not coming within its agreed jurisdiction, international law can make no pretence to regulate the occasions on which recourse may be had to war, the litigation of states. The result is strangely paradoxical. As between Nation A and Nation B international law declares A bound to do a certain act. A refuses: it has broken the law. War follows in which A is victorious. So far as international law is concerned the nation is now justified in its refusal. Such a practice is almost anarchical, and no analogies, however striking or numerous, between international law and law proper can blind us to the impassable gulf which divides them. Nor has the absence of a superior able to enforce obedience to law failed to exercise a weakening influence on the stability of international rules. An attentive study of European history suggests the conclusion that respect for irksome international obligations has been commonly coincident with the lack of material strength to evade them. The Russian denunciation of the Treaty of Paris is an instance in point. In 1856 Russia undertook by that treaty not to maintain a fleet in the Black Sea. In 1870, while the hands of Europe were tied by the Franco-Prussian War, she published a circular repudiating her obligation. England protested at the time, and a Declaration of London solemnly

<sup>1</sup> At present (March 1911) the prospects of ratification are in some doubt.



Sanctity of  
Treaties.

affirmed the inviolability of treaties. Russia, in the words of Mr. W. E. Hall, 'as the reward of submission to law was given what she had affected to take.' Her acquiescence in the Declaration is sometimes cited as a success for the authority of international law: it is to be hoped that its principles will not be exposed to many such Pyrrhic victories. A most damaging blow was struck by one of the greatest European statesmen of the nineteenth century, and international law will not soon recover from the cynical contempt with which Prince Bismarck—himself the representative of a people admirably moral and law-abiding—was never tired of bespattering it. The action of Austria, too, in annexing Bosnia and Herzegovina in 1908,<sup>1</sup> if it was not quite so flagrant as that of Russia in 1870, suggested nevertheless that the enunciation of the inviolability of treaties, though useful as an ideal for the guidance of international conduct, cannot always be trusted to be of practical effect. It is not easy to see in the analogies which have been cited between international and municipal law any reason for modifying the above opinions. They have been well summarised by Sir F. Pollock in an Oxford lecture. He points out that international rules have been discussed by the methods appropriate to jurisprudence, and not by those of moral philosophy. This is no doubt true, but a practical explanation suggests itself. The inconvenience of submitting every international dispute to a supposed absolute standard of right and wrong would be intolerable. Diplomatic correspondence is lengthy enough, without throwing upon diplomatists the duty of solving the nicest questions of abstract morality. Hence the view, not that international law is a complete entity, if only it could be found, but that its rules have been gradually and doubtfully collected from the varying practice of states. The method of inquiry involved by this theory is the patient examination of precedents—an examination which inevitably assumes a legal form. In the same passage Sir F. Pollock points out that there is an international morality distinct from and compatible with international law in the usual sense. We are not sure that this argument means more than that those who first sought to impose moral obligations upon states saw that there were ideals of conduct too exalted for international accept-

<sup>1</sup> See p. 102, *infra*, where this case is dealt with in more detail.

ance. Like practical men they exacted the highest standard for which obedience was to be hoped, and distinguished what lay beyond as admirable, but not obligatory. In other words the difference between international law and international morality is a difference of degree and not of kind, and it may be doubted whether the judgment of publicists would be severe or strongly adverse upon a nation which took up arms to avenge an admitted outrage on international morality.

8. It may be conceded to Mr. Hall<sup>1</sup> that 'the proper scope of the term "law" transcends the limits of the more perfect examples of "law"'; it may even be doubtfully admitted that the word, at its vanishing point, may be used to describe the usages of a community when a legalised self-help is the only redress for wrong; but such observances become clearly non-legal if the lawbreaker and the injured party are equally entitled to pray violence in aid, and if success is retrospectively allowed to determine the justice of their original quarrel.

It is, of course, in no way inconsistent with the views here set forth that certain branches of international law, *e.g.* the laws of contraband, are treated as binding in municipal tribunals. The reason is that they have been adopted into the municipal law of the state which administers them. In England this adoption may be due directly to the legislature,<sup>2</sup> or to the judges who indirectly effect changes in the law.<sup>3</sup>

9. Sir F. Pollock has made the following observations on the nature of international rules: 'We are not called upon to consider here whether they are more nearly analogous to the law administered by courts of justice within a state, or to purely moral rules, or to these customs and observances in an imperfectly organised society, which have not fully acquired the character of law, but are on the way to become law.'<sup>4</sup> The analogy last suggested is no doubt a fairly exact one, but it must always be remembered that international law may have attained to a perfect development of type: and may therefore be an inchoate law never destined to reach maturity.

<sup>1</sup> 6th ed., p. 14.

<sup>2</sup> 7 Anne, c. 12.

<sup>3</sup> *Cf.* on the question what rules of international law will be treated as binding by municipal courts, *Cook v. Sprigg*, 1899, A.C. 572; *West Rand Central Gold Mining Co. v. The King*, 1905, 2 K.B. 391. And see p. 14 *infra*.

<sup>4</sup> *Jurisprudence*, p. 13.

Meaning of  
"Law."



The Hague  
Conferences.

10. It could only become perfect law if the general body of states comprised a tribunal sitting to decide disputes by reference to established principles, and able to enforce their awards on recalcitrant members of the national family. It would then become law without ceasing to be international. The Hague Conference of 1907 may, as we have seen, result in the establishment of a court clothed with the first but not with the second of the above attributes; and the institution of such Conferences has naturally directed attention to the possibility of an age of peace. Serious thinkers, not daring to hope that the future will differ materially from the past, while human character and human motives remain unchanged, gave little encouragement to the more ambitious of the Russian proposals which led up to the first Hague Conference. The charge of cynicism sits lightly upon those who sorrowfully believe in the inevitableness of war, for such a view is consistent with a very sincere detestation of its horrors. There is a tendency observable to-day, particularly among those whose occupations happen to be pacific, to exaggerate the other side of the picture.<sup>1</sup> Their views receive little encouragement from men who have seen war face to face. It is a curious commentary on the psychological materials to which our modern peacemakers are driven, that their strongest argument is drawn from the growing destructiveness of modern weapons.

International  
Law and  
Municipal  
Law.

11. The question has been often discussed and differently answered, how far civilised states consider the admitted rules of international law to be binding upon their own tribunals in cases not covered by the municipal law. So far as this country is concerned the statute 7 Anne, c. 12 is expressed

<sup>1</sup> Thus Mr. Woolsey, a very humane writer, cheerfully observes (*Int'r. to International Law*, ed. 5, p. 184):—'To states, by the divine constitution of society, belong the obligations of protecting themselves and their people, as well as the right of redress, and even perhaps that of punishment. To resist injury, to obtain justice, to give wholesome lessons to wrongdoers for the future, are prerogatives deputed by the Divine King of the world to organised society, which, when exercised aright, cultivate the moral character and raise the tone of judging throughout mankind.' The passage is well known from Mr. Gladstone's Midlothian speech:—'However deplorable wars may be, they are among the necessities of our condition: and there are times when justice, when faith, when the welfare of mankind require a man not to shrink from the responsibility of undertaking them. And if you undertake war, so also you are often obliged to undertake measures which may tend to war.'



to 'declare' not to 'enact,' the privileges of ambassadors, and Municipal the preamble recites an insult 'contrary to the law of Law. nations.' The judgment of Lord Mansfield in *Triquet v. Bath*<sup>1</sup> contains an interesting observation on this point:—

'I remember a case before Lord Talbot of *Buvot v. Barbert* in which Lord Talbot declared a clear opinion that the law of nations in its full extent was part of the law of England, and that the law of nations was to be collected from the practice of different nations and the authority of writers. And accordingly he argued and determined from such instances and the authority of Grotius, Barbeyrac, Bynkershoek, Wiquefort, etc., there being no English writers of eminence on the subject. I was counsel in the case and have a full note of it. I remember, too, Lord Hardwicke's declaring his opinion to the same effect.'

Even more emphatic were the propositions accepted in principle by the American Federal Government:<sup>2</sup>—

'The law of nations is part of the municipal law of separate states. The intercourse of the United States with foreign nations, and the policy in regard to them being placed by the Constitution in the hands of the Federal Government, its decisions upon these subjects are by universally acknowledged principles of international law obligatory on everybody. The law of nations, unlike foreign municipal law, does not have to be proved as a fact. The law of nations makes an integral part of the laws of the land.'

These concessions are very remarkable, though they are hardly perhaps borne out by well-known decisions of the American prize courts. If the view put forward be well-founded, an English judge, if satisfied of the existence of an international rule, is bound to apply it in a proper case whether the English law provides him with a warrant or not. The generous verbal tributes to international law, which are so familiar, are not reinforced by practice on this point, and the opposite conclusion forcibly stated by Cockburn, C.J., in *R. v. Keyn*,<sup>3</sup> is difficult to refute.

'And when in support of this position . . . the statements of the writers on international law are relied on, the question may well be asked, Upon what authority are these statements founded?

<sup>1</sup> 3 Burr. 1478.

<sup>2</sup> Maine Lectures, *International Law*, p. 36.

<sup>3</sup> L.R. 2 Ex. D., pp. 202, 203.

When and in what manner have the nations who are to be affected by such a rule as these writers, following one another, have laid down, signified their assent to it? to say nothing of the difficulty which might be found in saying to which of these conflicting opinions such assent had been given. For even if entire unanimity had existed in respect of the important particulars to which I have referred, in place of so much discrepancy of opinion, the question would still remain, how far the law as stated by the publicists had received the assent of the civilised nations of the world. For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding the law must have received the assent of the nations who are to be bound by it. . . . Nor in my opinion would the clearest proof of unanimous assent on the part of other nations be sufficient to authorise the tribunals of this country to apply without an Act of Parliament what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the legislature. The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law: but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law, such as that now insisted on.'

To the same effect Lush, J.,<sup>1</sup> observed :—

'International law . . . cannot enlarge the area of our municipal law, nor could treaties with all the nations of the world have that effect. That can only be done by Act of Parliament.'

An intermediate view was expressed by the Lord Chief-Justice in the case of the *West Rand Central Gold Mining Company v. The King*.<sup>2</sup>

'It is quite true that whatever has received the common assent of civilised nations must have received the assent of our country, and that to which we have assented, along with other nations in general, may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations and the international law sought to be applied must, like anything else, be proved by satisfactory evidence which

<sup>1</sup> L.R. 2 Ex. D. at p. 239.

<sup>2</sup> 1905, 2 K.B. 391.



must show either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised state would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient.<sup>1</sup>

This would appear to recognise that a rule of international law will, without municipal legislation, be enforced in a municipal court if it can be proved from history and not from text-books: but the dictum was not essential to the decision of the case.

Perhaps another proposition, also accepted by the American Government, may be admitted to modify the sweeping affirmations of the rule as set out in *R. v. Keyn*.<sup>1</sup>

'The law of the United States ought not, if it be avoidable, so to be construed as to infringe on the common principles and usages of nations and the general doctrines of international law. Even as to municipal matters the law should be so construed as to conform to the law of nations unless the contrary be expressly prescribed. An act of the Federal Congress ought never to be construed so as to violate the law of nations if any other possible construction remains, nor should it be construed to violate neutral rights or to affect neutral commerce further than is warranted by the law of nations as understood in this country.'<sup>2</sup>

Probably the practice is accurately stated in the two following propositions: (i) International law is not administered by municipal tribunals unless it has been adopted by the state legislature, and such adoption will not be presumed; (ii) Municipal law will where possible be so construed in doubtful cases as not to conflict with the rules of international law.

In 'municipal tribunals' there are not, for the purpose of the above remarks, included national prize courts. These, though they may be bound by positive enactment of the legislature, administer a law deduced from international practice and agreement which need not necessarily have been endowed with any legislative authority.

<sup>1</sup> Quoted Maine, *International Law*, p. 36.

<sup>2</sup> Cf. with this view the judgment of Gray, J. in the *Paquete Habana*, the *Lola*, (1899), 175 U.S. 677.

## Summary.

12. To summarise briefly the views expressed in this chapter as to the real nature of international law, it consists of rules to control relations which have a legal rather than a moral character; its treaties and controversies have assumed a legal guise, encouraged by a general willingness to increase their apparent obligatoriness, but it is habitually deficient in that coercive side of the term law, which is above all others essential and characteristic. All civilised nations agree that they are bound by its principles, and in the majority of cases find it convenient to observe them. On the other hand, these principles are not infrequently violated, and breaches may be consecrated by adding successful violence to the original offence. In reality the sources of its strength are three: (i) a regard—which in a moral community often flickers but seldom entirely dies—for national reputation as affected by international public opinion; (ii) an unwillingness to incur the risk of war for any but a paramount national interest; (iii) the realisation by each nation that the convenience of settled rules is cheaply purchased, in the majority of cases, by the habit of individual compliance.

## PART I

### CHAPTER I

#### NOMENCLATURE AND SOURCES

1. THE name 'International Law' is due to Jeremy Bentham. Name. In a well-known passage he observes :—

'The word "international," it must be acknowledged, is a new one, though it is hoped sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which goes commonly under the name of the law of nations : an appellation so uncharacteristic that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence. The Chancellor D'Aguesseau has already made, I find, a similar remark : he says that what is commonly called *droit des gens*, ought rather to be termed *droit entre les gens*.'<sup>1</sup>

International Law is to be carefully distinguished from the body of rules variously known as Conflict of Laws, Private International Law, and Comity of Nations. These rules form part of the private law of every civilised nation, and determine the appropriate *jus* and the appropriate *forum* in disputes between two persons acknowledging different nationalities. They are in no way concerned with the reciprocal legal relations of states.

2. It was pointed out in the introductory chapter that by a comparatively modern development in the history of nations, codes are being drawn up which, like the Hague Conventions of 1899 and 1907 and the Declaration of London of 1909, are partly declaratory of existing practice, so far as it can be ascertained, and partly agreements enunciating new law : and even should such codes fail to be ratified, they will probably be treated as carrying great authority by all the nations

Sources of  
International  
Law.

<sup>1</sup> Bentham : *The Principles of Morals*, xvii. 25, note.



## Sources.

whose delegates shared in their drafting unless the failure to ratify implies a specific repudiation. It was suggested that, in all matters not dealt with by such codes, the rules of international law are not a perfect system, existing somewhere in the clouds and intuitively determinable, but are generalisations inductively drawn from the practice of civilised states in their mutual dealings. The adoption of this view effects an immense simplification in the study of international law; when once the *à priori* method is laid aside, the occasions for obscurity become infinitely fewer, and the science at least rests upon a firm historical basis. To decide whether a given practice is legal or illegal, an examination of precedents is necessary, of a kind very familiar to all lawyers. If authority pronounces itself in favour of a particular practice, a writer who disapproves of it must content himself with advocating a change. We may, with Professor Westlake,<sup>1</sup> admit 'Reason' as a source of international law, in so far as by 'reason' is meant the discovery of principles from precedents, the application of these principles to new cases and, it may be, the propounding of new rules to meet the changing conditions of modern life: but international law will never acquire the strength sufficient to carry it through a period of strain unless authority is made to exclude individual opinion almost as decisively as it does in our English system. To underrate the influence of the great jurists would be a proof of inattention or ignorance; but aggressive states are little likely to soothe the suggestions of ambition by admonitions drawn from Grotius, Puffendorf, Vattel, or Heffter, unless the practice of rival nations has lent them an additional semblance of authority. If these views are well founded, the sources<sup>2</sup> of international law ought not to be very difficult to discover. They will first be sought in such formal agreements as have been drawn up by international conferences of statesmen and

<sup>1</sup> Westlake, *International Law*, Part I. p. 15.

<sup>2</sup> It is submitted that the above use of the term 'source' of law is the most correct and analogous. The Roman expression was *fons juris*, and the metaphor was responsible for a like ambiguity in Latin usage. In both popular and strict language the source of a legal rule is the author of its legal character. Thus in England the only source of law is the Crown and the two chambers acting harmoniously. Political speculation and the science of legislation are the 'sources' whence spring the *ideas* by which the 'source of law' is excited into activity (*cf.* however, Austin, Lect. 28).

jurists, and where these fail, it is hardly too much to say that Sources. the sole source of law is national practice. But several media of proof are admissible to establish this practice; and two qualifications are necessary. Recent practice is more binding than that which is older, and where nations differ the value of competing precedents must be determined by reference to the number and importance of the states adhering to each, and their relative interest in the subject in question. Rules of maritime law, for instance, must be mainly sought in the practice of the leading maritime states. The following are the chief agencies by which the rules of international law are commonly ascertained:—

- (i) The writers of text-books.
- (ii) International treaties.
- (iii) Opinions invited by their own Governments from experts in international practice.
- (iv) Declarations of law made by tribunals of international arbitration.
- (v) Decisions of prize courts and similar tribunals.
- (vi) Private instructions given by individual states to their armed forces, and to diplomatic representatives.

It is proposed to treat of these in order.

#### I. TEXT-BOOKS

3. The writings of such men as Ayala, Grotius, Puffendorf, Bynkershoek and Vattel, have undoubtedly contributed greatly to the development of rules controlling the intercourse of states, and it is important to notice exactly how their influence has been exerted. In some cases, by minute historical investigation, these great jurists have influenced practice by recalling it to the channel of an almost forgotten precedent. In others they have openly advocated changes which, by their inherent reasonableness, have afterwards procured acceptance for themselves. Here, in an indirect and circuitous sense, text-books give birth to law, just as the persuasive tongue of a diplomatist may cause the adoption or abandonment of an international practice; but the real source of the law, the decisive criterion of its existence, is not the argument of the book or the speech, but the imprimatur



Text Books. practically supplied by international adoption. It is no doubt true that these writers have been repeatedly cited in English courts, and that their opinions have often been judicially considered: the explanation is to be found in the presumption, inevitably drawn by English lawyers, that such authorities may be relied upon to supply a trustworthy statement of existing practice. They are cited much as Blackstone and Coke are cited, not to make legal rules, but to prove their existence, and to construe them in a doubtful case. The passage in Kent<sup>1</sup> is well known in which he affirms that 'no civilised nation that does not arrogantly set all law and justice at defiance will venture to disregard the uniform sense of the established writers in international law.' The truth of this remark may be unreservedly conceded. But it is quite certain that no conclusions resting upon *à priori* reasoning, and unsupported by international practice, ever have commanded the 'uniform sense' of such writers. Their unanimity will usually coincide with a reasonable unanimity, or at least a preponderating weight, of international precedent.

## II. TREATIES

4. We are here concerned not generally with the conventional law of nations, but with treaties as evidentiary of legal rules. For this purpose a broad classification of treaties may be usefully made into (a) Treaties which purport to be declaratory of existing law, or formative of new law; (b) Non-declaratory treaties.

### (a) *Declaratory Treaties*

5. The value of such agreements is very high, though it will naturally vary with the influence and number of the nations who are co-signatories. If a majority of the civilised powers formally and deliberately sanction a principle, its legal character becomes definitively binding upon those who assent to the treaty, and it may be, by effluxion of time, upon other nations also.<sup>2</sup> The Congress of Vienna in 1815, the Declaration of Paris in 1856, the Geneva Conventions of 1864

<sup>1</sup> *Commentary on International Law*, Lecture 1, p. 2.

<sup>2</sup> The Declaration of Paris was respected by two non-signatory powers during the Spanish-American War.

and 1906, the Declaration of London of 1871,<sup>1</sup> the Treaty of Washington of the same year, the Berlin Congress of 1886, the Hague Peace Conferences of 1899 and 1907, and the Declaration of London of 1909, all belong to or resulted in the class of agreement under consideration. A declaratory treaty, which is largely adopted by influential states, will hardly be resisted for long by an isolated non-signatory, and even where the treaty is avowedly formative of new law, convenience, public opinion, and the authority of its sponsors are likely insensibly to induce acceptance.

(b) *Non-declaratory Treaties*

6. Under this head may be quite conveniently included all conventions between individual powers, or a number of powers falling short of a concert, to affect particularly the relations of the signatory powers. It has been often observed that such treaties ordinarily possess very little evidentiary value: indeed, they are less likely to show what the law is than what the law is not, for nations, like individuals, are unlikely to stipulate expressly for objects of which the law itself assures them. If two nations agree by treaty that a particular article shall be contraband, there is *prima facie* reason for supposing the commodity to be innocent by the common law of nations. Bynkershoek<sup>2</sup> has grafted a reasonable qualification upon the severe common-sense of this view. He points out that when a long succession of treaties between the great civilised states has stipulated for a modification of the common law, so that such a modification has in practice become almost universal, there comes a time when the original rule perishes from inanition, and is replaced by its successor. The exact moment of change may be difficult to determine, but illustrations of the completed process could be readily multiplied.

III. OPINIONS BY JURISTS IN ANSWER TO THEIR OWN GOVERNMENTS

7. The value of such opinions as evidence of international law is clearly somewhat one-sided. At most they can only

<sup>1</sup> See p. 9.

<sup>2</sup> *Quaestiones juris publici*, L. i. c. 14, § 69.



Opinions of  
Jurists.

bind the country which elicits them, and even then, if the point of submission be genuinely doubtful, the obligation is mainly conscientious. Still there are occasions when such opinions may be usefully employed by an opponent in reliance on a principle which in English law is called Estoppel. A civilised nation could scarcely act in the teeth of its own law advisers. In this country the opinions of the law officers of the Crown in international disputes certainly supply a weighty indication of English practice, and if foreign countries associate themselves with such doctrines in a more overt manner, a general rule springs up, the obligation of which Great Britain could hardly disregard.

#### IV. TRIBUNALS OF INTERNATIONAL ARBITRATION

8. In the nineteenth century about thirty considerable disputes were settled by means of arbitration tribunals. The importance which the judgments in such cases might be expected to possess has been sometimes lessened by a previous agreement on the legal points involved, leaving only the facts to be dealt with in the submission. Thus in the Geneva Arbitration the United States insisted upon a preliminary statement of the principles which were to guide the arbitrators in their consideration of the facts. Where a reference is unlimited, and the tribunal impressive, the moral weight of its decision will no doubt be considerable: third parties, of course, are in no way bound by its conclusions, and in at least one case a party to the submission has repudiated the decision.<sup>1</sup>

<sup>1</sup> In 1863 the United States rejected a hostile award on the British American boundary question. It is clear, however, that the Hague Peace Conferences have extended the scope of international arbitration, as will be shown in the chapter on International Arbitration, *infra*. Sir J. Pauncefote and Sir H. Howard, neither of them idealists, reported to Lord Salisbury on July 31, 1899:—

‘The most important result of the Conference is the great work it has produced in its “Project of a Convention for the pacific settlement of international conflicts.” That work, even if it stood alone, would proclaim the success of the Conference. It was elaborated by a committee composed of distinguished jurists and diplomatists, and it constitutes a complete code on the subject of good offices, mediation, and arbitration. Its most striking and novel feature is the establishment of a Permanent Court of International Arbitration, which has so long been the dream of the advocates of peace, destined, apparently, until now never to be realised.’

## V. PRIZE COURTS

## Prize Courts.

9. Prize courts are often called international courts, and the name is justified in so far that the law administered by such tribunals is not municipal but international. They are, however, the creatures of positive municipal law, and their decisions are binding, not through any international sanction, but because the court is seised, in the legal phrase, of the subject in dispute, and can make practically effective the jurisdiction committed to it by its own positive law. These courts are set up by belligerents to try disputes between their own governments and subjects and the governments and subjects of other states. Their decisions supply very valuable evidence of international practice, and by comparing the judgments of the prize courts of different countries on similar points, one is often enabled to arrive at positive conclusions of international law. The functions of such courts were well described by Sir W. Scott in the *Maria*:<sup>1</sup>—

<sup>1</sup> 'In forming that judgment, I trust that it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls for from me: namely, to consider myself as stationed here not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent states, some happening to be neutral, and some to be belligerent. The seat of judicial authority is indeed locally here, in the belligerent country, according to the known law and practice of nations: but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question, if sitting at Stockholm<sup>2</sup>—to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If therefore I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question. . . .'

10. It has been observed that the authority of prize courts rests upon municipal law. The power of dictating

<sup>1</sup> 1 C. Rob. at p. 349 (1799).

<sup>2</sup> The neutral litigant was of Swedish nationality.



Prize Courts. the grounds upon which their decision shall proceed is logically involved in this fact, was assumed by England and France in the Napoleonic wars, and is assumed by Russia and other nations at the present day.<sup>1</sup> The practice is unfortunate, for international law is thereby menaced on its strongest side.

With the proposed establishment of the International Court of Appeal, proposed by the Hague Conference of 1907, we deal fully elsewhere: it is only necessary to point out here that its decisions would transcend in authority those of any national court, and form a body of case law which no nation, save in the most exceptional circumstances, would be likely to disregard.

#### VI. INSTRUCTIONS ISSUED BY STATES TO THEIR ARMED FORCES, DIPLOMATIC AGENTS, ETC.

II. The practice of issuing manuals for the guidance of officers in the field was first adopted by the United States, after the American War of Secession. The Conference of Brussels was followed by a multiplication of such manuals, and instructions of this kind are now issued by Great Britain, France, Germany, and most other civilised countries. It is clear that the direct authority of a single manual may be of inconsiderable value, but if a rule is unanimously, or even generally affirmed in these private instructions, it is very reasonable to suppose that it has made its way into international law. The result is highly satisfactory. It is above all things desirable that the rules of war should be ascertainable, and a collation of the manuals of usage makes it possible to state with confidence many general rules on belligerent practice.<sup>2</sup>

<sup>1</sup> See Sir E. Grey in the *Times*, April 8, 1909.

<sup>2</sup> But in the recent *Bundesrath* controversy with Germany, Lord Salisbury declined to be bound by the English Admiralty regulations.

## CHAPTER II

### INTERNATIONAL STATUS OR PERSONS IN INTERNATIONAL LAW, TO WHICH IS ADDED AN ACCOUNT OF THOSE BY WHOM THEY ARE REPRESENTED IN FOREIGN COUNTRIES

#### INTERNATIONAL PERSONS

1. STATES and states alone enjoy a *locus standi* in the law of nations: they are the only wearers of international personality. This fact has been sometimes obscured by the occasions on which one state finds itself face to face with the individual citizens of another, and is permitted to assume jurisdiction over them of a quasi-penal character, for acts not in themselves illegal. The practice is exceptional, and will be considered in its place. A clear distinction, too, must be drawn between states and their sovereigns or Governments. The Holy Alliance in 1820<sup>1</sup> attempted to set up particular types of governments as international entities, and agreements between states as agreements between their rulers; but the theory was repudiated by Lord Castlereagh in 1821, and it is contrary to the generally accepted principles of international law.

The diplomatic representatives of states in foreign countries are not themselves subjects of international law, and, as Professor Holland has noticed, it is misleading to describe them as international persons. But at the same time they undoubtedly derive a reflected personality from their principals, and by this reflection their legal position is generally affected. Under these circumstances the present chapter seems to be the most convenient place for describing the privileges and duties of diplomatic agents.

2. A state within the meaning of international law may be described as a permanently organised society, belonging

International  
States.

<sup>1</sup> See p. 58 *infra*.



Characteristics  
of a State.

to the family of nations, represented by a Government authorised to bind it, independent in outward relations, and possessing fixed territories. In detail every society claiming admission to the law of nations must satisfy the following requirements :—

- (i) It must be represented by a government which receives a *de facto* allegiance from its subjects.
- (ii) It must be a sovereign independent state.
- (iii) It must exhibit reasonable promise of durability.
- (iv) It must possess definite territories.
- (v) It must be recognised as a member of the family of nations.<sup>1</sup>

3. It is proposed to examine the various elements attributed above to international personality.

(i) The society must be represented by a Government which receives a *de facto* allegiance from its subjects, and recognition of it as an international state may properly be postponed, owing to internal instability, as in the case of Chile,<sup>2</sup> or while the issue of an armed revolt is still in doubt. The necessity for this requirement will be readily seen. The stability, and indeed the existence, of international relations would come to an end if negotiations with a Government were liable to be interrupted by assumptions of direct control on the part of its subjects. With the refinements of *de jure* claims international law is in no way concerned. For reasons which will appear later, it is, or should be, completely indifferent to the political character which the constitution of a particular country bears. Revolutionary committees, absolute monarchs, constitutional assemblies—all these are treated alike by the practice of nations, provided that they appear to rest upon a stable basis. The reservation is necessary, and is only an application of the caution, so familiar in private law, that negotiations are unsafe with an

<sup>1</sup> States undistinguished by the above marks are in theory beyond the pale of international law. If civilised nations observe its rules in their dealings with barbarians, it is pursuant to the rule *Legibus soluti lege vivimus*. The English contention on the subject of Dum-dum bullets supplies a curious illustration of this fact. The retention of the bullet was defended because it was found necessary to check the onslaughts of savage enemies. The legitimacy of the plea may be admitted on moral as well as legal grounds, if an equally effective and less barbarous check is unknown.

<sup>2</sup> Hall, 6th ed. p. 86.

imperfectly accredited agent. But there may be a society under a *de facto* Government which is nevertheless not an independent state, as, for instance, where a territory is occupied by military force against the authority of a previously established Government. The Confederate States in these circumstances were conceded the rights of belligerency but not of international independence.<sup>1</sup> Such a Government lacks the element of durability which we shall see to be necessary.

Characteristics  
of a State.

4. (ii) The society must be a sovereign independent state, that is to say, its internal control of all persons and things within its territory must be complete and exclusive, and its external relations must be independent of the control of any other society. This requirement is fundamental in modern international practice. It is, however, in no way essential to the conception of jural relations between states: it was little in harmony with the hierarchical bias of mediæval feudalism, to which the idea of dependence upon a superior was more familiar than that of independent equality. As Mr. Hall<sup>2</sup> truly says: 'If indeed a law had been formed upon the basis of the ideas prevalent during the Middle Ages, the notion of the absolute independence of states would have been excluded from it . . . it must have involved either a solidification of the superiority of the empire or legislation at the hands of the Pope.' The ground of this requirement of sovereign independence is substantially the same as that of the requirement of *de facto* allegiance to a Government: the object of both is to secure finality and permanence of obligation, to which the least degree of dependence upon a superior would be fatal. Speaking generally, therefore, there can be no degrees of independence. A state is either an independent unit or it is not, and there is no half-way house; though states in a position of imperfect independence may, like individuals, enter into relations of which international law is bound to take cognisance.

As the form of a state's Government is irrelevant, so also is it irrelevant to consider the means by which it attained independence. International law has, or ought to have, no concern with the moral conduct of those who are responsible for its foundation.

<sup>1</sup> Wheaton, 3rd ed. p. 34. *Thorington v. Smith*, 8 Wall., pp. 8-11.

<sup>2</sup> *International Law*, 6th ed. p. 18.



Unions of  
States.

5. The relations between states are of many varying degrees. Two or more states may be so closely united that the supreme power for all purposes, both foreign and domestic, is in one body, as in the case of England, Scotland and Ireland: and this is known as an incorporate union. If for domestic purposes the states exist as separate entities, their union is sometimes described as real, the instances given being Sweden and Norway and Austria and Hungary, but whether the union in any given case is incorporate, real, federal, or 'permanent personal'<sup>1</sup> is a question of nomenclature of no very great importance. Such distinction as there is between 'real' and 'federal' union is, perhaps, most properly described by Professor Westlake as lying 'not in the closeness of the international connection existing between the states united, but in the origin of that connection, the term federal being used to denote that a treaty is the origin of a connection identical in its international aspect with that which would be unhesitatingly called real if it arose from succession to a throne, or from internal constitutional change.'<sup>2</sup> Even the union of the United States of America, usually described as federal, is declared by Professor Westlake<sup>3</sup> to be incorporate, and only federal by way of reminiscence.

## Suzerainty.

6. Of states in a position of dependence, a distinction must be drawn between those under suzerainty and those under protection. A state under suzerainty is one which being part of the suzerain state has acquired certain of the attributes of international independence:<sup>4</sup> the presumption being that in all other respects it remains dependent. Its subjects are the subjects of the suzerain and it is at war if the suzerain is at war. Its position, in fact, does not differ in international theory from that of an individual state in a federal system. Since the dissolution of the Holy Roman Empire in 1806, states under suzerainty have become rare, and have been chiefly to be found in the Turkish Empire, where Moldavia, Wallachia and Servia, in 1856, at the Treaty of Paris, suc-

<sup>1</sup> The term applied by Twiss to Austria-Hungary after the Pragmatic Sanction of 1720, which provided that the two states should be under one monarch subject to rules of succession by which they could never be separated.

<sup>2</sup> Westlake, *International Law*, Part I. p. 35.

<sup>3</sup> *Ibid.*, p. 36.

<sup>4</sup> Hall, 6th ed., p. 29.

ceeded in throwing off practically the whole of the authority of the Porte before they were declared by the Treaty of Berlin in 1878 to be independent states.<sup>1</sup> An instance is, however, to be found in the case of Korea,<sup>2</sup> which was under the suzerainty of China, till the denial of China's claim by Japan and the Chino-Japanese war of 1894-5. After that date, Korea was recognised as an independent state by the Treaty of Shimonoseki in 1895, and by an agreement between Japan and Great Britain and a declaration by Russia in 1902. This recognition was, however, of an illusory character, as Russia shortly afterwards placed troops in the country and established what was in effect a protectorate (of which Japan had a nominal share), and the complicated character of the situation was one of the main causes of the Russo-Japanese war, at the beginning of which Japan, while ostensibly guaranteeing Korea's independence, in effect seized the country by force, and stipulated for power to make it the theatre of military operations. But the position of Korea during this period was too abnormal and too temporary to justify any classification according to the ordinary rules of international law, and the final annexation of the country by Japan in 1910 made little if any substantial alteration in its situation. The international position of Egypt is curious. Nominally under the suzerainty of the Porte, it has in fact become a part of the British Empire; and the permanence of the British occupation has now been placed beyond doubt. Egypt possesses to-day hardly a single element of international character, and neither the outward deference paid to European susceptibilities nor the shadow of control still enjoyed by the international courts can disguise the real facts. Whether the relations between the late South African Republic and Great Britain could be properly described as those of 'suzerainty' or not, is a mixed question of history and political science with which we are not called upon to deal. It is, however, important to notice that facts which were not and could not be disputed were fatal to any claim by that Republic to international independence. A nation cannot indefinitely surrender the treaty-making power to an-

<sup>1</sup> Lawrence, pp. 69, 70.

<sup>2</sup> See Smith and Sibley, *International Law as Interpreted during the Russo-Japanese War*, 2nd ed. p. 19.



other,<sup>1</sup> and at the same time retain its existence as a sovereign state.

Protectorates.

7. A protected state on the other hand is one which being *prima facie* independent has surrendered part of its rights to the protector: the presumption being that in all other respects it remains independent. Its subjects owe no allegiance to the protector, and it may be neutral while the protector is at war. The case of a protectorate sometimes raises nice questions: here it is evident that the view taken must depend on the degree of intimacy subsisting between the protecting and the protected states. A convenient evasion of the difficulty describes the position of the protected state as one of qualified or imperfect personality. During the Crimean War the Ionian Islands were under the protectorate of Great Britain. The case is a strong one, because the internal and external affairs of the islands were both controlled by this country, yet their neutrality was scrupulously respected throughout the war.<sup>2</sup> The explanation may be that the immunity from attack was conventional, for agreements were concluded by this country with Austria, Russia and Prussia, and that the effect of these conventions reacted upon the decisions of prize courts. It is certain that such a neutrality would not be respected for a moment if the protecting state derived any belligerent advantage from his occupation. It is not obvious that any characteristic attribute of personality survives to a state whose executive and foreign relations have passed into other hands, and it might be less misleading to note the claim to neutrality as exceptional, than to magnify a *scintilla juris* by such a description as imperfect personality. It may be further observed that if one of two belligerents were likely to derive any advantage from attacking a state, protected and controlled internally and externally by the other, it is not clear on what principle he would be bound to abstain from doing so: the protected state has made a surrender of all that is essential to national character, and the claim to respect an independence which has become purely nominal is little

Ionian  
Islands.

<sup>1</sup> By the Convention of London in 1884, Article 4, the Transvaal Republic agreed to make 'no treaty with any other state other than the Orange Free State, nor with any native tribe east or west of the Republic, without the approval of Great Britain.'

<sup>2</sup> *The Leucade*, Spinks, p. 237; Wheaton, 3rd ed. p. 50.

likely to impress practical statesmen.<sup>1</sup> Korea, for instance, Protectorates as we have already pointed out, though nominally an independent but in fact a protected state, was made a battleground during the Russo-Japanese War: a position entirely inconsistent with all theories of independence and neutrality. The word 'protectorate' is also used to describe those assumptions of limited control over, without actual occupation of, the territory of uncivilised tribes, which are a notable feature of the modern partition of Africa. With these protectorates, international law is concerned in that the claim of the protecting state is generally recognised as debarring other states from interference, as laying upon it a correlative responsibility for the security of the subjects of other states within the protected area, and as imposing on the subjects of other states the duty of submitting to the jurisdiction of the protecting state within that area:<sup>2</sup> and according to the German view, which will probably become universal, the native subjects of the protected area are to be treated, when temporarily in other territory, as the subjects of the protecting state.<sup>3</sup> But the rules of law on this question are in a vague and indeterminate condition, and much will depend upon the circumstances of each particular case: and in many cases the control of the protecting state involves so large an interference with the internal affairs as well as the external relations of the native state as to amount practically to occupation. A Conference of the Powers at Berlin, in 1884-5, agreed that the assumption of a protectorate in Africa should be notified to the other Powers.<sup>4</sup>

8. A state may be under the protection of another state without formally surrendering any of its control over foreign policy: and without therefore becoming in the proper sense of the term a protectorate. Such was the position of San Marino, which was successively under the protection of the Pope and of Italy:<sup>5</sup> and in the same category was the little

<sup>1</sup> Cf. the Cherokee Nation *v.* State of Georgia, 5 Peter's Reports 1.

<sup>2</sup> Hall, 6th ed. p. 126; Westlake, *Chapters on the Principles of International Law*, p. 184, and *International Law*, Part I. pp. 126, 127; and cf. The Foreign Jurisdiction Act, 1890-1, which is believed, with good reason, to be consistent with the exercise of jurisdiction over all persons in protected areas: a jurisdiction which was assumed by British Orders in Council in 1891, 1893 and 1894.

<sup>3</sup> Hall, 6th ed. p. 128.

<sup>4</sup> Article 34 of the General Act of the African Conference of Berlin.

<sup>5</sup> Westlake, *International Law*, Part I. p. 23.



Protectorates. principality of Monaco, though it is now an unprotected state.

India. To describe as protectorates the native states of the Indian Empire seems to be a misuse of the term. In theory independent, these states are in fact subject to an ultimate jurisdiction on the part of the British Crown, and are for all practical purposes part of the British Empire and therefore not within the purview of international law.

Personal Unions and Federal Systems. 9. In the case of a personal union, such as that which subsisted between Great Britain and Hanover from 1714 to 1837, 'the states so connected are properly regarded as wholly independent persons who merely happen to employ the same agent for a particular class of purpose, and who are in no way bound by, or responsible for, each other's acts.'<sup>1</sup>

International law therefore takes cognisance of them as separate states and disregards their union. In the case of a federal system on the other hand, international law takes cognisance only of the union and disregards the separate states. Here the constituent states of the federation have surrendered to a central authority the entire control of their foreign relations forming a *Bundestaat*, of which the most notable example is the United States of America.

Confederations. 10. In a confederation or *Staatenbund* the constituent states have surrendered to the central authority only a part of the control of their foreign relations; the great example of this kind of union being the German Bund, which existed from 1815 to 1866, in which the various states retained to themselves certain rights of receiving and accrediting ministers and of making treaties and alliances.<sup>2</sup> The distinction between a *Bundestaat* and a *Staatenbund* is often very narrow; the latter, as in the case of the Swiss Confederation, sometimes prepares the way for and shades off into the former; and the German Empire of the present day, though for all practical purposes a *Bundestaat*, nevertheless retains, in certain diplomatic rights belonging to some of its states, faint traces of the character of a *Staatenbund*.<sup>3</sup> At the other end of the scale are those unions of independent states, which have merely by temporary and revocable conventions submitted to a partial limitation of their freedom of

<sup>1</sup> Hall, 6th ed. p. 24.

<sup>2</sup> Hall, 6th ed. p. 26.

<sup>3</sup> Lawrence, p. 62.

action. The ruling analogy is that of an ordinary alliance, such as the Triple Alliance, which, being freely contracted between sovereign states, does nothing to impair their sovereignty.<sup>1</sup> Whether any particular union is of this kind or limits and qualifies sovereignty is in each case a question of fact.

11. (iii) The society must exhibit reasonable promise of durability.

The promise of durable existence must obviously precede international recognition; and such recognition though not necessary to establish the sovereignty of a state in relation to its own subjects,<sup>2</sup> is necessary before its international sovereignty is complete. The question when such recognition ought to take place becomes pressing when a new state is called into existence. Such new birth usually takes place in one of four ways.

1. Previously uninhabited districts are colonised, and a political society is organised in them.
2. Associations of men originally non-political change their character, and form themselves into a state.
3. A state hitherto dependent or semi-dependent is recognised as independent, or its independence is guaranteed by the other members of the family of nations.
4. A people hitherto dependent on another asserts its independence by a successful revolt.

Instances of the first mode will occur at once; the cases of the Congo Free State and the Barbary States will illustrate the second; and for the third the somewhat doubtful illustration of Korea may be given, and the equally doubtful instances which will be mentioned later in the paragraph on Neutralisation. There is, however, no reason in principle why a completely sovereign state should not come into being in this way, and the Congo Free State may perhaps be quoted as an instance of this kind of birth, besides being referred to under the second heading.

12. It was a phenomenon to which it is difficult to find a parallel in history. Composed of individual citizens of various states, with the King of the Belgians at its head, the

<sup>1</sup> Wheaton, 3rd ed. p. 49.

<sup>2</sup> Wheaton, 3rd ed., p. 33; *M'Ilvaine v. Cox's Lessee*, 4 Cranch, 212.



Promise of  
Durability.

International Association of the Congo was dependent upon no state. It secured concessions and occupied territory, and within six years from its formation in 1879 it had obtained recognition as an independent Government from all the important nations of the world. In 1888 the King of the Belgians became its sovereign, the Belgian Parliament taking particular care that between it and Belgium there should be nothing more than a personal union; and from that time the Congo Free State was in effect part of his private domain. In 1889 he made a will bequeathing it to Belgium (thereby violating a rule laid down by some writers that a king may not dispose of his kingdom),<sup>1</sup> and the question of its annexation during his life, first raised in 1895, was not settled till 1908, when the country was taken over by Belgium.<sup>2</sup> From all inquiry into the moral conduct of this remarkable state international law is fortunately relieved.

13. It is in the fourth case that international difficulties have been most seriously felt. The gulf between the declaration of independence and its vindication is often considerable: at what point may the claim to national existence be recognised by a genuinely indifferent neutral? The principle is as clear as its application is sometimes difficult. The definitiveness of a new accession to the family of nations may be recognised by neutrals when it has become reasonably evident that the attempt to subdue the revolt is doomed to permanent failure. The recognition of the American Colonies by France in 1778 was an unfriendly act, inasmuch as the issue of the attempt to subdue them was still highly doubtful: on the other hand, the caution which the United States and Great Britain showed in admitting the claims of the revolting Spanish American colonies, in the early part of the last century, furnishes an instructive instance of correct deliberativeness. The recognition may take place formally by treaty, or informally by the interchange of diplomatic representatives.

A clear distinction must be drawn between the recognition of independence and the recognition of belligerency. The latter may take place at a much earlier period than the former: indeed so soon as the insurgents are found to be

<sup>1</sup> Cf. Hall, 6th ed. p. 46; Wheaton, p. 46.

<sup>2</sup> See Ann. Register 1908, p. 342.



carrying on what is, in fact, a war which affects the interests of the recognising power. Great Britain recognised the belligerency of the Confederate States little more than a month after the outbreak of hostilities. The United States have claimed that this was unjustifiable: but the existence of a state of war had already been in effect admitted by a declaration of blockade by the Northern States, and it is now generally conceded that the action taken by the British Government was correct.<sup>1</sup>

Promise of  
Durability.

14. (iv) The society must possess fixed territories which must be reasonably large in extent.

The framework of international law was formed at a time when men's minds were dominated by territorial ideas, and practice has grafted no exception on the above requirement. A nomadic people could offer no security for the fulfilment of its obligations, and in fact there would be little temptation to form contracts with them.

It is immaterial that the territory varies in extent from time to time, so long as such variation does not affect the power of a state to fulfil its international obligations. The expansion of Sardinia into the Kingdom of Italy was not regarded as affecting existing treaties;<sup>2</sup> and a reduction in size, so long as an essential part remains, will not obliterate a state's identity though it may affect, of course, its power to carry out the terms of certain classes of treaties, such as those of guarantee or alliance. That the territories must be reasonably large is obvious. A community like the Pitcairn Islanders<sup>3</sup> may be quite civilised and may be left in the enjoyment of a peaceful independence, because it is not worth while to trouble them; but they can hardly be treated as an international state.

15. (v) The society must be a member of the family of nations.

It is difficult to indicate with precision the circumstances under which such admission takes place in the case of a nation formerly barbarous. One important requisite is that a state shall be under a system of law which gives to strangers and natives a reasonable approach to equality of treatment. The assimilation of European ideas, the growth of humane

<sup>1</sup> Wheaton, p. 40.

<sup>2</sup> Hall, 6th ed. p. 21.

<sup>3</sup> They are now, in fact, incorporated in the British Empire.

Civilization.

habits, the frank attempt to break down the barriers of exclusion, all these will insensibly prepare the way. Japan has fully established her claim to be recognised as a subject of international law. She acceded to the Geneva Convention in 1886; European nations have abandoned their extra-territorial privileges in her territory; she has attained to a high standard of conduct in warfare, from which she has only once fallen away :<sup>1</sup> she was a party to all the Conventions of the Second Peace Conference of 1907; her procedure at the Conference of London in 1908-9 was based upon a view of International Law which was marked by profound and careful study and a lofty sense of humanity; and since her war with Russia she has taken her place beyond question among the greater powers. In the case of China, there is more doubt, for it is not yet proved to what extent her troops can be brought to obey the rules of civilised war. In 1899, though summoned to the Peace Conference, she did not sign the Convention relative to the laws and customs of land warfare; but eight years later all hesitation in that respect had disappeared, and she was a party to all the Conventions of 1907. Precipitancy in admission is to be deprecated, and it is food for reflection that the Treaty of Paris in 1856 admitted Turkey to share in the advantages of the system of Europe, even though the Capitulations which exempted foreigners from Turkish jurisdiction were allowed to remain in force.

Theory of  
Equality.

16. In international as in municipal law the units are conceived of as equal. The equality of all citizens before the law is axiomatic in civilised systems, and the doctrine has received much verbal allegiance from statesmen on the larger stage of international relations. Sir Henry Maine<sup>2</sup> traces its origin to the old confusion between *jus gentium* and *jus naturæ*. If the society of nations is governed by natural law, the atoms which compose it must be absolutely equal. Men under the sceptre of nature are all equal, and accordingly commonwealths are equal if the international state be one of nature. 'The proposition that independent communities, however

<sup>1</sup> In 1894 Japanese troops indulged in a five days' massacre of all Chinese men, women and children in Port Arthur: but conduct hardly less disgraceful was proved against European troops during the advance upon Peking in 1900.

<sup>2</sup> *Ancient Law*, pp. 100-101.



different in size and power, are all equal in the view of the law of nations, has largely contributed to the happiness of mankind, though it is constantly threatened by the political tendencies of each successive age.<sup>1</sup>

Theory of  
Equality.

17. The influence for good which Sir H. Maine attributes to the theory of equality is a striking instance of the effect of idealism on the world's history. Nothing can be more certain than that the theory, in municipal law truistic, is, when applied to the position of states, inept and misleading. When we affirm that in England all men are equal before the law, we mean that the meanest peasant may litigate in equal terms with a powerful nobleman; what place can such a theory have in a system of self-redress? Can it be said without absurdity to a small state injured by a great one, 'Your cause is just: be not concerned at the poverty of your resources: in international disputes all states are equal: war, however, is the only litigation we know, and equality ends when you enter its court'?

18. The fiction has no doubt reacted upon international sentiment, and in this way prevented much wrongful aggression; but it must be noted that it has little correspondence with the facts of international life, and that in the rough and ready practice of nations suit *in formâ pauperis* is not a hopeful procedure. The Kingdom of Greece having been created in 1832, by England, France and Russia, with the assent of Austria and Prussia, can hardly claim any real equality with its creators; and all its history has been moulded by them even to the extent of their prohibiting it, by a pacific blockade, from making war<sup>2</sup> and dictating to it terms of peace.<sup>3</sup> Turkey has repeatedly been compelled to submit to the dictation of the Concert of Europe, which has long assumed a general superintendence over the destinies of the whole continent,<sup>4</sup> while in America, the United States, with the Monroe doctrine as their chief weapon, have taken up a somewhat similar position, without, however, interfering overmuch in the quarrels of the various South American States.

<sup>1</sup> *Ancient Law*, pp. 100-101.

<sup>2</sup> In 1886.

<sup>3</sup> In 1897, at the end of the war between Greece and Turkey.

<sup>4</sup> Cf. Lawrence, p. 245.

Neutralised  
States.

19. The state of neutralisation illustrates an abnormality of type in international character which may most conveniently be considered here. A neutralised nation is one which is prohibited indefinitely, or for a considerable period, from carrying on war except in its own defence, and from entering into any political alliance with other states, its neutrality or the inviolability of its territory being guaranteed in return by the great powers. It is, so to speak, bound over to keep the peace: and the undertaking is not regarded as impairing its sovereignty. The prohibition must proceed from the general body of nations, for a particular state cannot of its own accord cut itself adrift from the ordinary incidents of international character.<sup>1</sup> Neutralisation is easily distinguished from neutrality. It is normally permanent, general and involuntary, whereas neutrality is temporary, particular and voluntary. The three instances of neutralisation usually cited are those of Switzerland, Belgium and Luxemburg. In 1815 Great Britain, Austria, France, Prussia and Russia asserted the perpetual neutrality of Switzerland, and pledged themselves to maintain the integrity of its territories. In 1839 the same powers asserted the independence and neutrality of Belgium. Both countries have scrupulously observed the conditions of their peculiar position, and no attempt has been made to violate the independence of either. It is noticed by Mr. T. J. Lawrence<sup>2</sup> that Belgium was not permitted to assent to the neutralisation of Luxemburg in 1867, on the ground that such assent involved the assumption of responsibilities inconsistent with her own international limitations. A practical question is suggested by the dispute between Prince Bismarck and the inhabitants of Luxemburg during the Franco-Prussian war, who were accused by him of affording to France assistance which was inconsistent with neutrality: what is the remedy against a neutralised state for a refusal to redress international injuries? In strictness the aggrieved party should lay his complaint before the guaranteeing powers and request them

<sup>1</sup> The Congo State, in 1885, added to the anomalies of its position by declaring itself to be perpetually neutral; but it may be said, perhaps, that the situation was made regular by the assent of the powers (Westlake, *International Law*, Part I. p. 30).

<sup>2</sup> *International Law*, p. 489.



to procure satisfaction: in practice he would probably take this course, reserving a claim to act for himself if satisfaction were not forthcoming. If the occasion called peremptorily for immediate redress, it can hardly be doubted that a powerful nation would take the law into its own hands.<sup>1</sup> Neutralisation.

20. This operation of neutralisation can be applied to things other than states. In 1888 the Suez Canal was by a general agreement declared to be open at all times to all vessels, but so that no acts of hostility were to be committed in it, or within three miles of either end of it: with a prohibition against the blockade of either end of it, and against the presence of any belligerent vessel in its harbours for more than twenty-four hours.<sup>2</sup> How persons may be neutralised will be seen when we deal with the provisions of the Geneva Convention of 1864. Further, attempts have been made to neutralise a part only of a state, with what effect in practice remains yet to be seen. In 1815, at the second Peace of Paris, it was agreed that a part of Savoy,<sup>3</sup> which then belonged to Sardinia, should 'form a part of the neutrality of Switzerland,' Sardinia, if at war, being bound to evacuate the country and leave it to be garrisoned by neutral Swiss troops. On the transfer of Savoy from Sardinia to France in 1860, no definite agreement of all the powers was arrived at, but France in a vague way admitted a similar obligation: though it is with good reason doubted whether a state at war with France would be willing to treat as neutral, and therefore exempt from invasion, a territory which supplied France with troops and money. In the Franco-German war, there was no evacuation by France of Savoyard territory; and no question on the subject arose.<sup>4</sup>

21. From what has been said above, it will be clear that, strictly speaking, a chartered company has no claim whatever to international status. The facts perhaps are hardly so clear as the theory. These great corporations have played a part Chartered Companies.

<sup>1</sup> Bismarck threatened to disregard the neutrality of Luxemburg on the occasion referred to in the text.

<sup>2</sup> British State Papers, Egypt, No. 2 (1889).

<sup>3</sup> Wheaton, p. 556; Lawrence, p. 494.

<sup>4</sup> Corfu and Paxos were similarly neutralised when the Ionian Islands were transferred to Greece in 1864.



Chartered Companies.

so extraordinary in the history of the world; they have exercised jurisdiction of so high a kind, and with such immunity from supervision, that it is impossible to put them on one side with the observation that they are merely trading companies, and that their character is therefore extraneous to the subject of international law. A juster, and certainly a more convenient, view, is to conceive of a chartered company of the normal type as enjoying a delegation of sovereign power over a defined area. The terms of the delegation concern only the company, and the nation whence the authority proceeds. It is sufficient to third parties to know that a political act of the company is *prima facie* the act of the country to which it belongs, and that redress may be sought from that country for wrongs done by the company. So much seems to be involved in general principle. A nation cannot commit political functions to associations of its citizens, and then disclaim responsibility for their abuse. The degree of satisfaction is very likely to vary according to the position of the injured party, but it is hardly credible that a first-class power injured by a chartered company would acquiesce in a lower degree of satisfaction from the accrediting state than if the latter had directly been the aggressor. The temptation to employ chartered companies is obviously great. The administration of the East India Company was stained by much that was discreditable, but it none the less rendered splendid service to this country, and perhaps in the long run to humanity as well. Yet the objections must not be overlooked. Many of the defects in company government pilloried by the noble eloquence of Fox and Burke were no doubt particular and accidental, but some of them are permanently inherent in the system. Government by chartered company necessarily subordinates the social organism of the district under control to trading considerations. In no other branch of English public law would a Government be tolerated which avowedly existed for purposes of exploitation. It is undoubtedly true that pioneer work of incalculable value has been done by such companies in the past, and occasions may recur when their employment is the least of competing evils, but imperial and economical tastes are not gracefully associated, and the era of chartered companies should at most be a phase in the work of reclamation.

## THE REPRESENTATIVES OF STATES IN FOREIGN COUNTRIES

22. This subject is generally considered under the head of international rights: an arrangement supported by a supposed right of legation. The claim appears somewhat academic: in theory one state could hardly insist that another should accredit ambassadors to it, or receive them from it. No doubt the withdrawal of an ambassador usually precedes an outbreak of war: but antecedent differences and not the withdrawal are the *causæ causantes* of the war, and instances have occurred of an ambassador being withdrawn (as when Sir Henry Bulwer was withdrawn from Madrid in 1848) without more serious consequences than a temporary suspension of diplomatic relations. On the other hand, no two states could in practice permanently refuse to interchange representatives in time of peace: such intercourse is imperatively demanded by mutual convenience. It is only in exceptional cases and for special reasons that a state can justly decline to receive an ambassador. There may be personal objections to him, as in the case of the Duke of Buckingham, whom the French Court refused to receive when sent by Charles I.,<sup>1</sup> or he may have expressed views on the affairs of the nation to whom he is accredited, which make him liable to a suspicion of political partisanship, or otherwise unacceptable, as in the cases of Mr. Keiley and Italy,<sup>2</sup> and of Mr. Blair and China.<sup>3</sup> States may also refuse to receive an ambassador from a state of whose sovereignty there is any doubt; and papal legates have been objected to by states which would not recognise the claim which their presence would imply of the sovereignty of the Pope.<sup>4</sup>

State Representatives.

23. The precedence of diplomatic and other agents resident in foreign countries was determined by the protocols of the Congress of Vienna in 1815 and the Congress of Aix-la-Chapelle in 1818. It is as follows:—

Precedence.

<sup>1</sup> Cf. also the case of Cardinal Pole (Woolsey, *International Law*, 5th ed. p. 135).

<sup>2</sup> He had expressed strong views against the destruction of the temporal power of the Pope (Lawrence, p. 266; Hall, 6th ed. p. 293).

<sup>3</sup> He was believed to have expressed views very hostile to the presence of Chinese in America (Hall, 6th ed. p. 294).

<sup>4</sup> Hall, 6th ed. p. 292.



Precedence.

1. Ambassadors, legates, and nuncios.
2. Diplomatic ministers particularly accredited to sovereigns.
3. Resident ministers accredited to sovereigns.
4. Chargés d'affaires accredited to foreign bureaux.
5. To the above list must be fifthly added those who discharge consular functions.

Notwithstanding the nice gradations of this hierarchy, of which the ceremonial details need not concern us, a sufficient account of the subject can be given under the two heads of (1) Ambassadors ; (2) Consuls.

(1) *Ambassadors*

24. The practice of sending ambassadors to reside at foreign courts seems to date from the Reformation. Before that time they were looked upon with suspicion. The passage from Coke has been often cited, in which he says that Henry VII. of England was wise because he 'would not in his time suffer Lieger ambassadors of any foreign king or prince within his realm, or he with them, but upon occasion used ambassadors.'<sup>1</sup> So Grotius<sup>2</sup> affirms that a nation is not bound to receive resident embassies, for such are unknown to ancient practice : and the system clearly owes its existence to convenience and international courtesy rather than to any principle of law.

Exterritori-  
ality.

25. It is often somewhat largely stated that an ambassador enjoys the privilege of extraterritoriality. By this is, or should be, meant, that though *de facto* resident in the country to which he is accredited, his position *de jure* is regulated on the supposition that he still resides in his own country. This is by no means in all respects the case. An ambassador, for instance, cannot exercise, or cause to be exercised, judicial functions in the country to which he is accredited, and it is more accurate, though less dramatic, to say that certain immunities from the jurisdiction of municipal courts are conceded to ambassadors by the practice of nations. These exemptions, it is to be noted, apply even if the ambassador

<sup>1</sup> Fourth Institute, ch. 26.

<sup>2</sup> ii. 18, 3, cited by Woolsey, *Introduction to International Law*.

is a subject of the state to which he is accredited, unless that state on receiving him has specifically reserved its rights over him,<sup>1</sup> as it is entitled to do. They apply also, in general, to negotiators and representatives at a conference or congress, though such persons are not technically accredited to the state in which the meeting takes place.<sup>2</sup> Such immunities may be considered under two heads:—

- (a) Immunity from the criminal jurisdiction of the country to which the agent is accredited.
- (b) Immunity from the civil jurisdiction of the country to which he is accredited.

(a) Under no circumstances can an ambassador be tried for a criminal offence in the country to which he is accredited. The practice is well settled, and has been established in England since the case of Mendoza, the Spanish ambassador, who conspired to dethrone Queen Elizabeth. Nor can he be arrested under ordinary criminal process:<sup>3</sup> he may, however, be arrested by a high assertion of sovereign power for intriguing against the country in which his mission lies. Thus Count Gyllenbourg, the Swedish ambassador in 1717, was detained for some time in an English prison for plotting against the Hanoverian dynasty.<sup>4</sup> The French Government in 1718 arrested Prince Cellamare, the Spanish ambassador, on a similar charge. The case of Pantaleon Sa<sup>5</sup> is hardly consistent with modern practice. Sa was the brother of the Portuguese ambassador accredited to the Commonwealth: under outrageous circumstances he, or men acting under his direction, killed one person and wounded several others, and for this offence he was indicted, tried, and executed. The general view in later times is that the privileges of an ambassador are shared by his family living with him, and by his official and domestic suite;<sup>6</sup> though in England it has been claimed that a coachman of the United States' minister is subject to the English courts if he commits an assault out-

<sup>1</sup> *Macartney v. Garbutt*, 24 Q.B.D. 368.

<sup>2</sup> Westlake, *International Law*, Part I. p. 275, and cf. Convention XII. of 1907, Art. 13.

<sup>3</sup> Case of the Dutch ambassador and the Landgrave of Hesse Cassel, 1763.

<sup>4</sup> De Martens, *Causes Célèbres*, i. 101.

<sup>5</sup> Phillimore, ii. 211.

<sup>6</sup> See *Parkinson v. Potter*, L.R. 16 Q.B.D. 152.



Ambassadors. side the embassy, and there can be little doubt that it is more convenient and in no way derogatory to an ambassador's rights to try such cases on the spot. Disputes on this point will usually be avoided by the ambassador giving his consent. The correct course when an ambassador is suspected of criminal acts was indicated so long ago as 1571, in an opinion which Gentilis and Hotman were asked to give in Mendoza's case. He must be handed over to the authorities of his own country. The claim that an ambassador's house is a 'city of refuge' to criminals, which would be strictly involved in the extraterritorial theory, has long been generally abandoned in practice.<sup>1</sup> A diplomatic agent cannot be compelled to give evidence for the purposes of, or before, any court in the country of his sojourn: the immunity, however, is waived in a proper case, and the refusal to do so has been held to justify a demand for the agent's recall.<sup>2</sup>

(b) *Immunity from Civil Jurisdiction*

26. With regard to civil jurisdiction, there seems to be a general agreement that an ambassador is exempt in respect of all his official or private contracts, and so much property, real or personal, as is 'necessary to his dignity or comfort';<sup>3</sup> but there is no fixed international agreement in cases where he engages in trade, or is a large property holder in the country of his sojourn, such cases, of course, being very rare. The English common law seems to have allowed no immunity from civil jurisdiction at all to ambassadors. There is a dictum in Coke against the claim, but the law apparently remained uncertain until 1708. In that year the Czar's ambassador in London was arrested for a debt of £50.<sup>4</sup> A criminal information was entered against those responsible for the arrest. While the point of law was still under consideration, the statute 7 Anne, c. 12 was passed. The Act, which was in form declaratory, provided by section 3, 'That all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of any ambas-

<sup>1</sup> Cases of the Duke of Ripperda and of Springer: De Martens, *Causes Célèbres*, i. 101. See *infra* p. 45.

<sup>2</sup> Halleck, i. 294.

<sup>3</sup> Westlake, *International Law*, Part I. p. 267.

<sup>4</sup> Phillimore, ii. 228.



sador . . . of any foreign prince . . . received as such by her Ambassadors.

Majesty, or the domestic servant of such ambassador . . . may be arrested or imprisoned, or his goods or chattels be distrained . . . shall be deemed utterly null and void.' By section 4, attorneys suing such processes were made liable to punishment. Section 5 provides that the immunity of an ambassador's servants is forfeited by their occupation in trade. On this statute it has been held<sup>1</sup> that a person claiming the benefit of this Act as domestic servant to a public minister must be really and *bona fide* the servant of such minister at the time of the arrest, and the matter in respect of which he claims immunity must be connected with such service.<sup>2</sup> The privilege is that of the ambassador not of the servant.<sup>1</sup> This statute is a recognition of the principle, on which there is general agreement, of freedom from arrest and distraint, either of which might hamper an ambassador in the exercise of his diplomatic functions, and it has been interpreted as meaning that not only can execution not issue, but an ambassador cannot be sued against his will,<sup>3</sup> and the Statute of Limitations does not begin to run against his creditors so long as he holds his office.<sup>4</sup> An ambassador who sues as a plaintiff thereby submits to the jurisdiction of the court, presumably in so far as his personal liberty and his property held in virtue of his office are not affected: and he becomes liable to plead to a counter claim or cross action, but will not be compelled to give security for costs.<sup>5</sup> Unlike a sovereign, however, he is bound by police and administrative regulations, and it would seem that any real property which he owns in his private capacity is subject to the jurisdiction of the state in which it is situate.

27. It is clear that to describe an ambassador's house as part of the territory of his country is inaccurate, for a criminal who commits a crime or takes refuge there, can be surrendered without the formal process of extradition. The right of asylum is practically obsolete in Europe, Greece and Spain being the only countries in which it has been exercised of

<sup>1</sup> Fisher v. Begres, 2 C. and M. 240.

<sup>2</sup> Novello v. Toogood, 1 B. and C. 554.

<sup>3</sup> Magdalena Steam Navigation Company v. Martin, 2 Ellis and Ellis, 111. See also Parkinson v. Potter, 16 Q.B.D. 152.

<sup>4</sup> Musurus Bey v. Gadban, 1894, 1, Q.B. 535.

<sup>5</sup> Duke de Montellano v. Christian, 5 M. and S. 503.

Ambassadors. late years;<sup>1</sup> but it has by no means disappeared in the South American Republics. Whether the embassy can be entered by the local authorities without the ambassador's permission is a matter of doubt, and the practice of nations has varied. England has claimed the right to enter for the purpose of arresting an offender,<sup>2</sup> and all that can be said with confidence is that entry and search are justifiable in those extreme cases which justify an ambassador's arrest. The ambassador, his house and his official property, and in most cases all goods imported for his use,<sup>3</sup> are free from the payment of all taxes, rates,<sup>4</sup> or duties.

28. The United States Congress in 1890 passed an act of a similar scope<sup>5</sup> to the Statute of Anne, and continental practice has been almost uniformly favourable to the claim in its most generous form, though there is a substantial body of opinion in favour of the principle that an ambassador is subject to the jurisdiction of the country to the extent of his property other than property held in his official capacity, and particularly if he actually engages in trade. It may be mentioned here in passing that ambassadors enjoy no exceptional privileges at the hands of third persons or enemies. There is in a vague way a right of passage through the territory of friendly powers, which has, however, proved no protection from arrest for civil liabilities or criminal offences: but a belligerent may undoubtedly imprison the diplomatic agents of his enemy if found on his territory, even though they are on their way to a neutral state. This rule was long ago stated by Bynkershoek,<sup>6</sup> '*Non valere jus legationis nisi inter utrumque principem qui mittit legatos et ad quem missi sunt: cætera (eos) privatos esse.*' Practice has been in accord with this statement of the rule. A well-known instance was the arrest in 1744 of Marshal Belleisle, the French ambassador, while on his way through Hanover, during the Franco-English war. The diplomatic agents of a neutral found on enemy territory must be treated with due regard for their inviolability, and, as a matter of international courtesy, their communication with

<sup>1</sup> In 1862 and in 1873 respectively.

<sup>2</sup> Hall, 6th ed. p. 179.

<sup>3</sup> Up to the limit, as a rule, of a fixed sum (Westlake, Part I. p. 68).

<sup>4</sup> *Parkinson v. Potter*, 16 Q. B. 152; *Macartney v. Garbutt*, 24 Q. B. D. 368.

<sup>5</sup> *Cf. Dupont v. Pichon*, 4 Dall, 321.

<sup>6</sup> Cited by Woolsey.



their own Governments should not be interrupted: but it is Ambassadors, doubtful whether their rights are such as to override an 'evident military necessity.' During the Franco-Prussian war, the United States protested against the refusal of the Germans to allow their minister in Paris to send despatches to London in a sealed bag, but admitted that such refusal might be justified if such necessity were proved.<sup>1</sup>

29. The duties which such agents owe to their own countries hardly concern us here, but are a branch of the public law of the state to which they belong. Duties of Diplomatic Agents. Ambassadors, however, are forbidden by rules which are most jealously enforced, from any association, direct or indirect, with the public affairs of the country to which they are accredited. Mr. Hall<sup>2</sup> collects the instances in which violations of this rule have been followed by a request to the accrediting state to recall, or in an extreme case by dismissal. A well-known instance of dismissal occurred in 1888, when Lord Sackville, the English ambassador at New York, was given his passports and required to leave the country within three days. Lord Sackville had been asked to advise an unknown correspondent of English extraction and sympathies, how to vote in the Presidential election of that year. He replied suggesting in a general way that the then Government was friendly to this country, whereas Mr. Cleveland's intentions were unascertainable. The letter may have been an indiscretion, but, as Mr. Hall observes, 'it was treated as an open and international offence.'

### (2) *Consuls*

30. The term international agent should mean one who is a link in a chain of communication between two states. In this sense a consul is not, as such, an international agent. He is an official of the country for which he acts, intrusted with duties of a multifarious kind in a foreign country, and permitted by that country to discharge them within its borders. The permission involves certain privileges, the concession of which is somewhere along the border-line between courtesy and law. He has not, indeed, any immunity from the ordinary tribunals,<sup>3</sup> though their jurisdiction is

<sup>1</sup> Hall, 6th ed. p. 304.

<sup>2</sup> 6th ed. p. 299.

<sup>3</sup> *Viveash v. Becker*, 3 M. and S. 284.

## Consuls.

asserted so as to inconvenience him as little as possible in the discharge of his duties. In the United States practice is similar,<sup>1</sup> though American policy has added considerably by treaty to the functions and immunities of the consular service. The liability of a consul to be arrested is inconvenient, and his sudden arrest might be very prejudicial to members of the state for which he acts. The point was considered in this country in the case of *Clarke v. Cretico*,<sup>2</sup> when Mansfield, C. J., observed :—

'The office of consul is indeed widely different from that of an ambassador, but still the duties of it cannot be performed by a person in prison. . . . The words of the statute<sup>3</sup> are: "Ambassador or other public minister." But a consul is certainly not a public minister. In *Viveash v. Becker*<sup>4</sup> Lord Ellenborough summed up the matter as follows: "Nobody is disposed to deny that a consul is entitled to privilege to a certain extent, such as for safe-conduct, and if that be violated the sovereign has a right to complain of such violation. Then it is expressly laid down that he is not a public minister, and more than that, that he is not entitled to the *jus gentium*. And I cannot help thinking that the Act of Parliament which mentions only 'ambassadors and public ministers,' and which was passed at a time when it was an object studiously to comprehend all kinds of public ministers entitled to these privileges, must be considered as declaratory, not only of what the law of nations is, but of the extent to which that law is to be carried." It appears to me that a different construction would lead to enormous inconveniences, for there is a power of creating vice-consuls; and they too must have similar privileges.'

31. The general force of these arguments is great: the practice is common of choosing consuls from among the natives of the particular country in which their services are required, and it would be intolerable that men so appointed should be protected from the jurisdiction of their own tribunals. But though he may not be 'entitled to the *jus gentium*,' certain privileges are in practice conceded to a consul. He is allowed to place the arms of the country for which he acts over his house; he is immune from personal

<sup>1</sup> The Anne, 3 Wheat, 435.

<sup>3</sup> 7 Anne, c. 12.

<sup>2</sup> 1 Taunt, 106, 107.

<sup>4</sup> 3 M. and S. at page 297.



taxation, and from liability to jury service ; soldiers may not be billeted upon him, and his house is inviolable in time of war. We are not here concerned with the modes in which consuls are appointed, but it must be noticed that they cannot enter upon their duties until authorised to do so by an exequatur issuing from the country in which their duties lie. An exequatur is a more or less formal authorisation to do, within the jurisdiction of the country granting it, the different acts incidental to consular authority.

32. The duties of consuls are of a very various character, and can only be generally indicated. In the first place, as commercial agents, they are bound to succour tradesmen and sailors of the country by which they are employed : more generally, its citizens are entitled to look to their consul for advice and countenance in any of the innumerable difficulties which spring up among foreign surroundings. Consultative duties are among the most useful of those which fall upon consuls, and much invaluable knowledge is derived from the commercial reports which they are in the habit of submitting periodically to their Governments. Still more important are the judicial functions which they are permitted to discharge. These may be arranged under three heads in an ascending order of importance.

(i) The verification of births, marriages, and deaths, and the administration of intestate estates abroad among citizens of the country for which they act.

(ii) The exercise, within the limits locally conceded to them, of a disciplinary jurisdiction over merchant sailors of the employing state, and the decision, as arbitrators appointed by consent, of commercial disputes among its citizens.

33. (iii) In non-Christian and partially civilised states the consuls of civilised powers exercise by consent a very responsible jurisdiction. They are the judges, generally speaking, in all matters civil and criminal which concern their countrymen. The chief countries in which immunity from the local jurisdiction still survives are Turkey, Siam, and China. In these countries the practice is to try offences by natives against foreigners in the local court, by foreigners against natives in the consular court of the defendants, and in the court of the defendant's consul where the parties are foreigners of different nationality. The exemption from jurisdiction must be regarded as conventional where the

Consuls.

country in which it is asserted is a member of the family of nations : as an extension of the national jurisdiction, comparable to that claimed on the high seas and in savage countries, when it is not. In England this jurisdiction now rests on the Foreign Jurisdiction Act 1890.<sup>1</sup> Sections 1, 2, 3 of that Act are as follows :—

1. *It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has, or may at any time hereafter have, within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.*
2. *Where a foreign country is not subject to any Government from whom Her Majesty the Queen might obtain jurisdiction in the manner recited by this Act, Her Majesty shall, by virtue of this Act, have jurisdiction over Her Majesty's subjects for the time being resident in or resorting to that country, and that jurisdiction shall be jurisdiction of Her Majesty in a foreign country within the meaning of the other provisions of this Act.*
3. *Every act and thing done in pursuance of any jurisdiction of Her Majesty in a foreign country shall be as valid as if it had been done according to the local law then in force in that country.*

Similar provisions for the regulation of American consular courts are contained in Acts of Congress passed in 1848, 1860 and 1870. The mixed tribunals in Egypt were established in 1876 in the place of courts of this class : and their retention is largely due to political reasons.

34. It will be apparent that these judicial duties demand a high degree of knowledge and competence for their proper discharge : and it may be hoped that the tendency will grow for nations to engage at every important centre their own subjects in consular employment, excluding them at the same time from private trade. Under such conditions it would probably be found practicable to extend the immunities of consuls to the point rather prematurely assumed by Heffter,<sup>2</sup> when he affirms that they enjoy 'that inviolability of person which renders it possible for them to perform their consular duties without personal hindrance.'

<sup>1</sup> 53 and 54 Vict. c. 37.

<sup>2</sup> Section 244.



## PART II.

### THE RIGHTS AND OBLIGATIONS OF STATES IN TIME OF PEACE

WHEN we speak of a state as enjoying a right to do a certain act, we mean that the public opinion of other states will view the doing of that act with approval, or at least with acquiescence. Correlatively, a state lies under an obligation to do or forbear from a certain act when its omission to do, or non-forbearance from doing, that act will be viewed with disapproval and perhaps by an attempt to compel. Such rights and obligations are, of course, distinguishable from those of municipal law, which are enforced, if necessary, by the strong arm of society. In this limited sense of the words a consideration of the rights and obligations of states in peace, war, and neutrality forms a convenient method of exhibiting the whole subject of international law.

## CHAPTER I

### INDEPENDENCE

1. The statement that nations have a right to their independence is elementary and need not be elaborated. The principle has been often violated, but its immense practical influence can hardly be overstated. The sentiment of nationality, which in our own time called into being the kingdoms of Italy and Greece, and which combined with political considerations to effect the unification of Germany, depends on the assumption that men of one race should

Independence. enjoy an independent Government of their own. It is less easy to state positively the constituent rights, which, taken together, amount to independence. Mr. W. E. Hall has laid it down in general language<sup>1</sup> that 'independence is the power of giving effect to the decisions of a will which is free, in so far as absence of restraint by other persons is concerned. The right of independence, therefore, in its largest extent, is a right possessed by a state to exercise its will without interference on the part of foreign states, in all matters and upon all occasions with reference to which it acts as an independent community.' The last limitation is made necessary by the fact that 'a state is capable of occupying the position of a private individual within foreign jurisdiction, as, for example, in the case of England, which holds shares in the Suez Canal Company.'<sup>2</sup> Mr. T. G. Lawrence,<sup>3</sup> defines independence as 'the right of a state to manage all its affairs, whether external or internal, without interference from other states as long as it respects the corresponding right possessed by each fully sovereign member of the family of nations.' Both these definitions or descriptions are of a general character, and may require to be strictly modified in practice, but the essential conception is familiar, and therefore readily grasped. An independent state is entitled to live its own life in its own way, the sole judge within the law of its domestic government and its foreign policy. The particular form of government which it has chosen in the working out of its national destiny concerns itself and itself alone, for every independent state has the right of setting its own house in order. In asking how far these incidents are found at present in states claiming to be independent, it must be remembered that here, as elsewhere, authoritative international practice must be regarded, and not the repetitions of text-books. A consideration of the history of Europe and the American continents in the present century will make it clear that the rights to independence can only be claimed for many nominally independent communities with substantial qualifications.

2. Phillimore summarises the rights incident to independence as follows:<sup>4</sup>

<sup>1</sup> *International Law*, 6th ed. p. 47.

<sup>2</sup> *Ibid.*, p. 47, footnote.

<sup>3</sup> *International Law*, p. 111.

<sup>4</sup> *International Law*, vol. i. p. 162.



1. The right to a free choice, settlement, and alteration of the internal constitution and government without the intermeddling of any foreign state.
2. The right to territorial inviolability, and the free use and enjoyment of property.
3. The rights of self-preservation, and this by the defence which prevents, as well as by that which repels, attack.
4. The right to a free development of national resources by commerce.
5. The right of acquisition, whether original or derivative, both of territorial possessions and of rights.
6. The right to absolute and uncontrolled jurisdiction over all persons and things within, and in certain exceptional cases without, the limits of the territory.

Rights Incident  
to Independ-  
ence.

The same writer derives from 'membership of a universal community' of nations four other rights which may, at least as conveniently, be also referred to the principle of independence.

7. The right of a state to afford protection to her lawful subjects wheresoever situate.
8. The right to the recognition by foreign states of the national Government.
9. The right to external marks of honour and respect.
10. The right of entering into international covenants or treaties with foreign states.<sup>1</sup>

The points indicated in this summary afford a fair account of the rights involved in independence. It is in fact an abstract right limited firstly by the maxim, *Sic utere tuo ut alienum non lædas*, secondly, by the existence of similar rights in other nations, and thirdly, by the possibility that it may come into conflict with a competing principle to which it is bound to give way. The right to territorial inviolability involves the right of a state to prevent any other state from exercising any jurisdiction within its territory. A breach of this right was recently alleged in the case of Savarkar,<sup>2</sup> an Indian, who was being conveyed under arrest in a British ship to India to take his trial for abetment of murder. The

The Savarkar  
Case.

<sup>1</sup> *International Law*, vol. i. p. 163.

<sup>2</sup> See the *Times*, Feb. 25, 1911.

Rights Incident  
to Independ-  
ence.

prisoner escaped while the vessel was at Marseilles and was re-arrested on French territory, and the case came before the Hague Arbitration Court, who, by their judgment, delivered on the 24th of February 1911, found that the French police had been warned of his being brought to Marseilles; that he was arrested by a French officer and taken back to the vessel by that officer and three persons who had come on shore from the vessel; that no force or fraud had been employed by anybody from the vessel to obtain possession of him; and that, though an irregularity had been committed in delivering up a prisoner without extradition proceedings, there was in the circumstances no violation of French sovereignty, and nothing establishing any obligation on the part of Great Britain to deliver up the prisoner. The decision, by its negative findings, illustrates the positive rule that apart from waiver of the right, no nation may exercise criminal jurisdiction or arrest or confine any person in the territory of another nation.

The right to violate the independence of a nation is known as the right of intervention, and a consideration of the occasions when intervention is permissible will most usefully illustrate the inroads which practice has made upon independence.

Intervention.

4. 'Neither,' says Lord Bacon,<sup>1</sup> 'is the opinion of some of the schoolmen to be received that a war cannot justly be made but upon a precedent injury or provocation; for there is no question but a just fear of an imminent danger, though there be no blow given, is a lawful cause of a war.' This is the principle upon which intervention must ultimately depend. Where 'there is a just fear of an imminent danger,' or, rather more strongly, where the vital interests of a state are gravely menaced, the paramount principle of self-preservation comes into play. If a neighbouring country swells its armaments to a degree not to be reconciled with the simple aim of self-defence, if the preparations from the nature of the case can only be directed against one object, the community menaced may strike at its own time, without awaiting further provocation. International law is at its weakest, and its writers are least convincing, on the subject of intervention. The maxim, *Nemo potest judex esse in re sua*, has no place in the law of

<sup>1</sup> *Essay on Empire*.



nations, and the interested nation itself decides on the extent of provocation, and the imminence of peril. Under these circumstances it is not surprising that the line between policy and law is slightly drawn, so that high-handed acts of aggression have been able to masquerade under the name of intervention. The danger of a rule is apparent which would permit one nation to interfere in the concerns of another in order to prevent the wrongful intervention of a third, being itself the only judge of the likelihood of such intervention and of its moral or legal justifications. It seems possible to base upon the modern practice of nations a simple and more exclusive statement of the occasions on which intervention is permissible. It may be defended on two occasions only:—

1. When it is made necessary by self-preservation.
2. When it is undertaken by the general body of Powers.

5. (1) Professor Westlake,<sup>1</sup> taking as his text a passage from Rivier,<sup>2</sup> argues at some length against the suggestion that the right of self-preservation overrides in all cases the duty to respect the rights of others, and entitles a state to do violence to another state whose conduct has been innocent of all wrong. He points out that even an individual is not in English law allowed 'to ward off danger from himself by transferring it to an innocent person': and that even if an individual had such a right, it would not follow that the same thing could be said of a state. 'Patriotism should not allow us to forget that even our own good, and still less that of the world, does not always and imperatively require the maintenance of our state, still less its maintenance in its actual limits and with undiminished resources.'<sup>3</sup>

6. It can hardly be said, however, that a state would never be justified in violating the sovereignty of another state, unless that other had actually done, or threatened to do, it harm. Professor Westlake himself approves of the action of Great Britain who, in 1807, when there was an imminent danger of Napoleon and the Czar compelling the Danish fleet to join them against her, called upon Denmark, a

<sup>1</sup> *International Law*, Part I., p. 296.

<sup>2</sup> *Principes du Droit des Gens*, t. i., pp. 277-8.

<sup>3</sup> Westlake, *International Law*, Part I. p. 299.



Self-preservation.

friendly nation, to surrender her fleet till the war was over, and on her refusing, captured that fleet by force. It is true that Professor Westlake justifies his approval of the course taken by an attempt to bring the case within the rule that a state may defend itself against another which threatens to attack it. 'The principle,' he says, 'that the legal rights of a state are not to be violated without its own fault, is not really infringed, for when a state is unable of itself to prevent a hostile use being made of its territory or its resources, it ought to allow proper measures of self-protection to be taken by the state against which the hostile use is impending, or else must be deemed to intend that use as the necessary consequence of refusing the permission. It is a principle of jurisprudence that every one is presumed to intend the necessary consequences of his actions.' But that is equivalent to saying that Denmark was morally to blame for not being a power strong enough to resist France and Russia: for how otherwise was she under any moral obligation to hand over her fleet to Great Britain, and how on her refusal to do so did she become a state in fault against whom Great Britain was entitled to take so extreme a step? It is surely better to admit that there may be circumstances in which, in self-defence, a state is entitled to violate the sovereignty of another, even though that other is in no way in fault; and to insist only that such violation shall be accompanied by the minimum of injury, and be justified by the most urgent necessity. The simple fact was, that in view of the forces against her, Great Britain had every reason to fear invasion and possible conquest if the Danish fleet were brought into operation; and the real defence of her action is, that she only intended to sequester the Danish fleet, and pledged herself to restore it when the danger was over. The question is one of the degree of injury done rather than of the moral delinquency, actual or constructive, of the injured state. The Danish incident was an extreme case: it would hardly be argued that any imaginable danger would have justified Great Britain in conquering and annexing Denmark, or even in capturing her fleet, without a previous offer of restitution or compensation. But the rule so laid down and so safeguarded (we call it a rule, though it is in fact an exception to the rule of the inviolability of state sovereignty) will satis-

factorily cover all those cases where a state 'intervenes' by violation of the sovereignty of another state, which is not, except by a rather strained application of a legal presumption, guilty of any actual or threatened attack. Such cases usually involve little more than a sentimental injury to the state which suffers from the intervention. The best known is that of the Carolina (1838), in which, to prevent an invasion of Canada, which the United States were either unable or unwilling to check, a British force seized and destroyed a vessel in United States' territorial waters. Somewhat similar had been the action of the United States in 1817, when the Spanish Amelia Island was seized by Spanish insurgents. Spain was unable to prevent them from becoming a danger to the United States, and the latter thereupon occupied the island. Under the same heading may be classed those cases where a state violates the flag of a friendly nation at sea, when that flag is being used by individuals to cover a hostile enterprise. Spain, in 1873, seized the *Virginus*, a vessel fraudulently registered in the United States, but belonging to and used by Cuban insurgents; and whatever may be said of the summary execution of those on board, there was nothing to complain of in the arrest.

7. While, therefore, it must probably be admitted that the invasion of the sovereignty of a non-offending and friendly state is in extreme circumstances permissible, it will be generally agreed that intervention should so far as possible be exercised only against a state which itself threatens danger to the intervening state. Self-preservation should mean self-defence. Every claim to intervene on these grounds must be judged on its own particular facts. Great Britain, in 1804 was justified in attacking Spain on discovering that that country was about to join France and was preparing for war.<sup>1</sup> Austria in 1813 was justified in joining Russia and Prussia against Napoleon, when the movement of his troops showed an intention to intimidate her by force.

8. To deal uncontroversially with highly controverted facts, the truth is elementary that Great Britain would have been legally justified in intervening to prevent the further armament of the Dutch Republics, assuming that such armaments

<sup>1</sup> Lawrence, *International Law*, p. 121.



Self-preservation.

clearly exceeded the limits of proper self-defence.<sup>1</sup> Whether the possibilities opened up by the Jameson Raid, and the revolutionary schemes imputed to Johannesburg, raised the requirements of legitimate self-defence high enough to justify the extraordinary elaborateness of the Boer armaments, is a question which different persons will no doubt answer differently. The principle at least is clear. A further illustration may be drawn from the war in which this country became involved in consequence of the French Revolution. *Prima facie* France in 1792 was as much entitled to enjoy an uninterrupted revolution as England in 1688. The legality of the intervention must stand or fall with the seriousness or otherwise of the apprehension that an aggressive propagandism of revolutionary principles was contemplated by the French Convention. No doubt the danger was exaggerated, but the *rédaction* of November 19, 1792, is still on record:—'La Convention nationale declare qu'elle accordera secours à tous les peuples qui voudront recouvrir leur liberté et elle charge le pouvoir exécutif de donner des ordres aux généraux des armées Françaises pour secourir les citoyens qui auraient été ou qui seraient vexés pour la cause de la liberté.' It is easy to say now that the menace was never more than verbal, but it must have appeared terrible enough to those who viewed with deepening apprehension the conceptions of *la liberté* which were growing in French favour.

The Holy Alliance.

9. The doctrine under consideration was pushed to wholly inadmissible lengths by the Holy Alliance, the pretensions of which are of great historical interest, because out of them sprang by revulsion the Monroe Doctrine. The parties to this understanding were the rulers of Russia, Austria, Prussia and France. Setting aside the idealist tinge contributed by the dreamy mind of the Emperor Alexander, the objects of the Alliance as developed at the Congresses of Aix-la-Chapelle, Troppau, and Laybach were clear enough. A circular issuing from Austria, Russia and Prussia alleged the existence of 'a vast conspiracy against all established power, and against all the rights consecrated by that social order

<sup>1</sup> Cf. Bismarck's intimation to Lord Loftus, July 13, 1870: 'I am positively informed that France has been and is now arming. If this go on, we shall be compelled to ask the French Government for explanations. — *Our Chancellor*, Busch., vol. ii. p. 55.



under which Europe had enjoyed so many centuries of glory and happiness.' . . . 'They regarded as disavowed by the principles which constitute the public right of Europe all pretended reform operated by revolt and open hostility.' Lord Castlereagh's despatch in reply<sup>1</sup> has been often referred to: such principles 'were adapted to give the great powers of the European continent a perpetual pretext for interfering in the internal concerns of its different states . . . though no government could be more prepared than the British Government was to uphold the right of any state or states to interfere, where their own immediate security or essential interests are seriously endangered by the internal transactions of another state it regarded the assumption of such a right as only to be justified by the strongest necessity, and to be limited and regulated thereby. . . . The British Government regarded its exercise as an exception to general principles of the greatest value and importance, and as one that only properly grows out of the special circumstances of the case: but it at the same time considered that exceptions of this description never can, without the utmost danger, be so far reduced to rule as to be incorporated into . . . the Institutes of the Law of Nations.'

The Holy  
Alliance.

10. In 1823 the powers to whom the despatch was addressed had under consideration the propriety of helping Spain to subdue her rebellious South American colonies. Proposals were actually made to hold a congress to consider South American affairs. Mr. Canning, then Foreign Minister of Affairs, suggested to the American minister in London that any attempt by Europe to decide the fate of states so nearly connected with the United States by community of geographical and political interest as the South American Republics, ought to be most jealously watched. Out of this suggestion arose the celebrated Monroe Doctrine, which was embodied in the annual message of President Monroe in 1823. It contained two distinct statements:—

The Monroe  
Doctrine.

1, 'It is a principle in which the rights and interests of the United States are involved that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for colonisation by any European power.'

<sup>1</sup> January 19, 1821.

The Monroe  
Doctrine.

2. 'With the existing colonies and dependencies of any European Power we have not interfered and we shall not interfere, but with the Governments who have declared their independence and maintained it, and whose independence we have on great consideration and on just principle acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny by any European power in any other light than as the manifestation of an unfriendly disposition towards the United States.<sup>1</sup>

II. The lawyer is not concerned with the wild speech of President Grant in 1870: 'He hoped that the time was not far distant when in the natural course of events the European connection with the continent would cease,' but need only notice the attempts which have been made to treat the doctrine as a part of international law, and inquire how far they can be supported. Putting on one side the self-denying ordinance which precludes America from interference with European questions, two principles are contended for, which may be respectively termed:—

1. The non-colonisation principle;
2. The non-intervention principle.

It is material to notice that the assertion of each was elicited by particular circumstances: the first by a Russian attempt to acquire the North-West Territory, the second by the designs of the Holy Alliance. In 1895, however, in his message to Congress of December 17, President Cleveland observed of the doctrine: 'It may not have been admitted in so many words to the Code of International Law: but since in International Councils a nation is entitled to the rights belonging to it, if the enforcement of the Monroe Doctrine is something we may justly claim, it has its place in the Code of International Law as certainly and surely as if it were specifically mentioned.' A more completely circular argument was never devised, and the greatest American writer in international law<sup>2</sup> has taken the other view strongly: 'The declarations are only the opinion of the Administration of 1823, and have acquired no legal form

<sup>1</sup> See an article on the historical origin of the Monroe Doctrine in the *Times* for January 8, 1896.

<sup>2</sup> Dana, Note to Wheaton, § 67, note 36.



or sanction.' On the other hand, they have often been insisted upon by American statesmen, and have become more and more a settled principle of American policy.<sup>1</sup> In 1824, when a general negotiation was in progress between this country and the United States, the assertion by the latter of the non-colonisation principle was met by a refusal on the part of Canning, who represented this country, to proceed any further in the Anglo-American controversy with Russia. The English view was unequivocally placed on record that Great Britain considered the whole of the unoccupied parts of America as being open to her future settlements in like manner as heretofore.

The Monroe  
Doctrine.

12. It is, however, on its intervention side that the doctrine Venezuela. has attracted most attention. The American contention in the Venezuela negotiations in 1895 far exceeded the scope hitherto claimed by the most extensive commentators on President Monroe's message. A long-standing dispute between Great Britain and Venezuela as to the proper boundary between the Republic and British Guiana became acute in 1895. The British claims were finally affirmed in the form of an ultimatum. Venezuela, it need hardly be said, is a sovereign independent state. Under these circumstances appeared the message of President Cleveland. The material portions of the message were as follow :—

'The balance of power is justly a cause of jealous anxiety among Governments of the Old World, and a subject for our absolute non-interference. None the less is the observance of the Monroe Doctrine a vital concern for our people and their Government. . . . If an European power, by an extension of its boundaries, takes possession of the territory of one of our neighbouring republics against its will and in derogation of its rights, it is difficult to see why, to that extent, such European power does not thereby attempt to extend its system of government to that portion of this continent which is thus taken. . . . The dispute has reached such a stage as to make it now incumbent upon the United States to determine, with sufficient certainty for its justification, what is the true divisional line between the Republic of Venezuela and British Guiana. . . . I suggest that Congress make an adequate appropriation for the expenses of a commission, to be appointed by the Executive, which

<sup>1</sup> Strangely enough, the doctrine has never been directly affirmed by either the Senate or House of Representatives



Venezuelan  
Boundary Dis-  
pute.

shall make the necessary investigation and report upon the matter with the least possible delay. When such report is made and accepted, it will, in my opinion, be the duty of the United States to resist, by every means in its power, as a wilful aggression upon its rights and interests, the appropriation by Great Britain of any lands, or the exercise of governmental jurisdiction over any territory which, after investigation, we have determined of right to belong to Venezuela.'

13. The actual dispute was settled by arbitration in 1899, for the greater part in favour of the British claim: but Venezuela was represented throughout the arbitration by the United States. The broad question of the right of the United States to dictate to European nations in their relations with South American States remained unsettled. If the claims then made are sanctioned by acquiescence so as to become a portion of international law, the doctrine of equality may be finally banished from our text-books, to be replaced by a legal hegemony on the part of the United States over the whole of the American continents. It is involved in the American claim that no European nation can exact redress from a South American Republic in the only manner in which a demand for redress is likely to be at all effective. Powerful European nations are not likely to acquiesce in a view which in effect concedes national character to these states while exonerating them from its correlative responsibilities. Nor is it to be supposed that the sane judgment of thoughtful Americans will insist on a view so extreme: it is, however, not impossible that political exigencies may in time compel the United States to declare a protectorate over the South American Republics. Such a step, whatever its political aspects, would at least clear the legal atmosphere, and would effectually meet the legitimate American aversion to a violent European irruption into the New World. Until such a change takes place, the lawyer may dismiss the doctrine with the comment that in its most moderate form it involves an enormous addition to the commonly received conception of the rights of self-preservation.

#### SECOND GROUND OF INTERVENTION

The Concert  
of Powers

14. It was stated that intervention was permissible, in the second place, when undertaken by the general body of

civilised states in the interests of general order. This ground of intervention is often ignored by writers who acknowledge much more disputable justifications. No writer who derives his views of law from the practice of states, and not from theoretic reasoning, can refuse to admit it. It has been repeatedly asserted, and its exercise has not been questioned during the past century.<sup>1</sup> The international birth of Greece in 1832 was the result of a European intervention in the affairs of Turkey; the petulant childhood of the kingdom thus called into existence was systematically regulated by the Concert of Europe, and under the same tutelage Greece has received periodic accessions of territory at the expense of Turkey. By a similar exercise of jurisdiction the independence of Belgium was extorted by the great powers in 1830 from the King of Holland, and in 1878 a conditional independence was bestowed upon Montenegro, Roumania, and Servia. On each of these occasions the act was clearly one of intervention: the jurisdiction is thus established in practice, and is not objectionable in theory. Unanimity of the great powers is the best guarantee against individual self-seeking.<sup>2</sup>

15. It is believed that the two grounds of intervention which have been considered are alone consistent with modern practice. It is sometimes suggested that on humanitarian grounds one nation is justified in intervening to prevent practices shocking to humanity within the territory of another. The occasional benefits of such intervention would be outweighed by its liability to abuse. In theory no doubt it is regrettable that international law should prohibit, even by implication, the suppression of outrage, but in practice the number of national Don Quixotes is not found to be con-

<sup>1</sup> See the very sensible observations of Mr. T. G. Lawrence, *Principles of International Law*, second edition, pp. 242, 243.

<sup>2</sup> Developments in the Far East make it impossible to limit the activity of the concert of powers to European complications: and the recent instances of intervention in Chinese and Japanese affairs have been on the whole warnings against a too reckless indulgence of the habit. There was little but personal self-interest to be traced in the intervention of Russia, Germany and France, which prevented Japan from taking full advantage of the Treaty of Shimonosheki, and in the various operations of 'leasing' Chinese territory which followed. These were illustrations rather of the rivalry between, than the concert of, powers: but the Boxer rising in 1900 was the opportunity for an admirable statement of the conditions on which concerted intervention depends, made by M. Delcassé in the French Chamber on June 11, 1900. The French minister observed:—



Intervention on  
Grounds of  
Humanity.

siderable, and thinkers of very different schools are content to distinguish between the moral standards applicable respectively to individuals and communities.<sup>1</sup> Sir William Harcourt, in his *Letters of Historicus*, has described humanitarian intervention as a high act of national policy over and beyond law. This view is indecisive unless such acts are to be withdrawn from the purview of international law altogether, for their legal or illegal quality requires determination all the more imperatively that they have a 'high political' character. It is often stated that intervention depending upon a treaty right is permitted, but the claim is perhaps somewhat academic. If the arrangement is merely dynastic it cannot be supported, for the sovereign who has exposed his country to an intervention intended to secure his dynasty, has clearly exceeded the limits of his competence as a national agent; if, on the other hand, one country has entitled another to intervene indefinitely in its domestic concerns, the derogation from independence would probably not consist with the retention of international character.

16. Intervention in a foreign civil war has been sometimes

'For the second time recently the legations have been obliged to demand troops of the naval commanders. The common peril dictates resolutions to the powers. I do not know if they have divergent views, but the affirmation of their solidarity is the surest guarantee for the safety of each. The powerlessness of the Chinese Government to suppress an insurrection which does not appear to inspire it with either fear or surprise is becoming irremediable, so that new and serious misfortunes must be expected. I have instructed our minister, at whose disposal I have placed all our forces in the Far East, and others if required, to keep himself in constant communication with his colleagues of the diplomatic corps whose accord has not ceased to be complete. At the present moment, while I am speaking, a step is being taken, or is about to be taken, by the various legations to call the attention of the Chinese Government for the last time to the imperious necessity of putting down a movement which imperils both the empire and itself, as well as the interests which the powers cannot disregard. If this appeal were to remain without effect, the powers would no longer have to take counsel with any one but themselves, and to take into account nothing but the interests of civilisation; and I imagine that if a misunderstanding were destined to arise between them, it would be as to which would be ready the first, which would assemble most rapidly the most effectual means to defend with its own cause the cause of civilisation itself' (Letter, date June 11, from the *Standard* correspondent in Paris).

<sup>1</sup> Bismarck's cynical remark, that he placed the bones of a Pomeranian grenadier above all Armenia, has been often reprobated and is offensive in expression, but the general principle of which it was only a particular application is commonly acted upon by statesmen of every country, and even Mr. Bright strongly denounced the views of those who would make England the Knight-Errant of Nations.



declared legal, but the case hardly requires separate consideration. If undertaken at the invitation of both parties, it is mediation by request and therefore unobjectionable; if at the invitation of one, then it is either an unjustifiable interference with an established Government or an equally unjustifiable attempt to dictate to a nation the form of government under which it shall be ruled, for Mr. Hall's observation is unanswerable: ' . . . The fact that it has been necessary to call in foreign help is enough to show that the issue of the conflict would without it be uncertain, and consequently that there is a doubt as to which side would ultimately establish itself as the legal representative of the state.'<sup>1</sup>

Intervention in  
Civil War.

17. The theory of the balance of power has in the past frequently supplied an excuse, but seldom, if ever, a justification for intervention. At the beginning of the eighteenth century the prospect of a union between France and Spain was the cause of much fighting, and Napoleon III. relied upon the theory in his attempts, partly successful and partly unsuccessful, to increase the territory of France: but little has been heard of it in late years. The idea of preserving an 'international equilibrium of forces' must always exercise a certain influence upon diplomacy, but the world, except in certain phases of popular discussion, has apparently abandoned the notion that a state may justly be attacked and punished for becoming too strong.

Balance of  
Power.

<sup>1</sup> 6th ed., p. 287.

## CHAPTER II

### PROPRIETARY AND QUASI-PROPRIETARY RIGHTS AND DUTIES

THE rights and duties of nations considered as proprietors may be arranged under three heads :—

1. Rights over land.
2. Rights over water.
3. Rights over miscellaneous objects.

#### I. RIGHTS OVER LAND

A state may exercise control over land in a variety of degrees, directly as over an integral part of its dominions, or indirectly as over a protectorate or sphere of influence. In the two cases last mentioned it is a question of fact in each case whether the rights claimed are proprietary at all in their character. A state may acquire territory in a variety of ways of which four are sufficiently important to be mentioned here. These are *Occupation*, *Cession*, *Conquest*, and *Prescription*.

Occupation.

1. Occupation is a good root of title to territories altogether unoccupied or inhabited by savages, who, by a humorous fiction, are considered incapable of possessing territory.<sup>1</sup> The rules of occupation were borrowed wholesale from the very sensible provisions of Roman private law. Discovery of new territory by a private individual was generally held to confer a good title on the state to which he belonged. For a time the rule was not practically inconvenient, but the discovery of the New World subjected the doctrine to a strain which it

<sup>1</sup> It is better to state this proposition boldly than like Phillimore (vol. i. ch. xii. ccxlii. p. 286) to accept the argument, 'The North American Indians would have been entitled to have excluded the British fur-traders from their hunting-grounds; and not having done so, the latter must be considered as having been admitted to a joint occupation of the territory, and thus to have become invested with a similar right of excluding strangers from such portions of the country as their own industrial operations pervade.'



was wholly unable to support. The rule which originally determined the right to a derelict article in the streets of Rome was applied to the vast territories which each year's maritime adventure was disclosing to the nations of the world. Spain and Portugal relying partly on Papal bulls and partly on discovery, claimed the right to divide between themselves the hitherto undiscovered areas of the world. Henry VII. of England laid claim to a share, respecting in theory the rights of prior discoverers. These pretensions produced a reaction until in our days 'prior discovery, though still held in considerable respect, is not universally held to give an exclusive title.'<sup>1</sup> Unless followed up by settlement, 'discovery is only so far useful that it gives additional value to acts in themselves doubtful or inadequate.'<sup>2</sup> Private individuals, bearing no commission from their Government, are not capable of legal occupation;<sup>3</sup> but acts of control done and continuing to be done by such persons, if ratified by their Governments, may be retrospectively validated. Further, the state act of occupation or of ratification must be of a public nature, so that due warning may be given to other states.<sup>4</sup> The underlying principle is that occupation to be valid must be reasonably effective, having regard to the circumstances of the particular case. Formal annexation, without more, is not therefore a root of title, though the fact of such previous occupation may lend a different colour to later acts which, if they stood alone, would be indifferent or indecisive. These conclusions have been stated with great common-sense by Mr. Hall:<sup>5</sup>—

'It can only be said, in a broad way, that when territory has been duly annexed, and the fact has either been published or has been recorded by monuments or inscriptions on the spot, a good title has always been held to have been acquired as against a state making settlements within such time as allowing for accidental circumstances, or moderate negligence, might elapse before a force or a colony were sent out to some part of the land intended to be

<sup>1</sup> Maine, *International Law*, p. 66.

<sup>2</sup> Hall, 6th ed. p. 102.

<sup>3</sup> The United States in the Oregon dispute based a claim on an unratified discovery and occupation by private individuals. This was not admitted by Great Britain, and the question was settled by a treaty (1846). See Westlake, *International Law*, Part I., p. 100.

<sup>4</sup> Cf. *The Fama*, 5 C. Rob. 106, 115, 116, Westlake, Part I., p. 100.

<sup>5</sup> 6th ed. p. 103.



Occupation. occupied ; but that in the course of a few years the presumption of permanent intention afforded by such acts has died away, if they stood alone, and that more continuous acts or actual settlement by another power became a stronger root of title.'

Area of Occupation. 2. It is clearly important to define the area over which a geographically partial act of occupation may be allowed to extend. In the early days of American colonisation, extravagant pretensions were put forward by both England and France, and the view is alleged (though probably wrongly) to have been held in this country that occupation of the coast carried with it the whole continent to the Pacific Ocean.<sup>1</sup> A more reasonable rule is generally adopted, that occupation of a coast shall comprehend the interior as far as the watershed of the river flowing into the sea at the point of occupation : laterally such occupation embraces the tributaries of such rivers, and the territory covered by them.<sup>2</sup> Even these principles, however, may lead to extravagant results, particularly in the case of rivers like the Mississippi, and disputes on the subject have usually ended, like the Oregon dispute, in compromise. A claim to the 'hinterland' of a coast settlement may probably be admitted if the region claimed can only be reached by transit through the occupied coast : if that region is accessible from another direction then, in the words of Professor Westlake, 'it can only be within moderate limits of space and for a moderate duration of time proportioned to the urgency of the need of protection for trade and settlement in the interior, that a sphere of interest radiating from the nearest coast will properly command international respect.'<sup>3</sup> It may be supposed that the area within which the doctrines above stated can be practically applied is rapidly lessening, although in recent times the opening up of the African continent has brought them into prominence. The future lines of African colonisation have now been generally determined by agreement, but useful illustrations of the principles of occupation may still be drawn from the Oregon territory dispute between this country and the United States

<sup>1</sup> There was no limit specified in the English colonial grants, and the early settlers seem to have met French aggression with indefinite claims to the interior.

<sup>2</sup> This principle was stated at the Louisiana negotiation in 1804. See Twiss, *Law of Nations*, i. pp. 125, 126.

<sup>3</sup> *International Law*, Part I. p. 114.

in 1844,<sup>1</sup> the Louisiana dispute between the latter country and Spain in 1803,<sup>2</sup> and the Venezuelan boundary dispute between Great Britain and Venezuela in 1895-9.<sup>3</sup> Occupation.

Islands in the sea present questions of less difficulty. Here, again, much depends upon the facts, the size of the island and the nature of the occupation; but occupation of one part is more easily presumed to be occupation of the whole. *Prima facie* an island belongs to the nation within whose territorial waters it lies, but the presumption may be rebutted on proof of an adverse root of title. Islands which are formed by 'alluvium and increment' from the soil of a coast belong naturally to the state which owns that coast.<sup>4</sup> Islands.

3. Occupation can only come into play when there is a *res nullius* to be occupied, but the requirement is of course satisfied when territories, previously occupied by a civilised country, are definitively relinquished. In the Santa Lucia negotiation between this country and France in 1763, it was admitted that abandonment for ten years may be treated as definitive. The Delagoa Bay dispute between this country and Portugal in 1875 established the principle that, when the power to control is never lost, occasional acts of sovereignty are sufficient to keep alive a title by occupation. The question of African colonisation was considered at the Berlin Conference in 1885, and an agreement arrived at by all the great powers, including the United States, which is likely to avert misunderstandings in the future. The signatory powers bound themselves to acquire no land and assume no protectorates on the coast of Africa without notifying one another of their intentions; and they formally laid down the principle that occupation must be effective by recognising 'the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent, sufficient to protect existing rights and, as the case may be, freedom of trade and transit under the conditions agreed upon.'<sup>5</sup> It is possible that the convenience of the practice of

<sup>1</sup> *Parl. Papers*, iii. 1846, Oregon Correspondence. Twiss, *Oregon Question*, c. iv.; Hall, 6th ed. p. 109.

<sup>2</sup> *British and Foreign State Papers*, 1817-1818. Hall, 6th ed. p. 107.

<sup>3</sup> Cf. Hall, 6th ed. p. 111.

<sup>4</sup> The Anna, 5 C. Rob. 373.

<sup>5</sup> General Act of the Berlin Conference, Arts. 34, 35. *Parl. Papers*, Africa, No. 4, 1885. The 'conditions agreed upon,' referred to the Congo Basin.



Occupation. notification may procure its reception in regions other than the African coasts. The articles as they stand do not cover even the whole of the African continent, and an attempt by Great Britain at the Conference to get them so extended met with no success; but Great Britain has already acted upon the principle of notification in the case of Bechuanaland and France in the case of the Comino Islands.<sup>1</sup>

Prescription. 4. The acquisition of territory by cession and conquest needs no detailed notice, but the place of prescription in international law may be shortly considered. The old Roman plea for prescription *ne dominia rerum diutius in incerto essent* applies in the abstract with equal force to international law, and the majority of writers are agreed that international rights may be acquired and lost by lapse of time. The doubts, however, suggested by De Martens<sup>2</sup> and Klüber,<sup>3</sup> as to whether the doctrine of prescription exists at all in international law, cannot be dismissed as entirely fanciful. In municipal systems the prescriptive acquisition of rights is ordinarily regulated by the maxim, *Fraus omnia vitiat*, and so guarded, the limitation which ownership undergoes for its own protection does not come into conflict with the general conscience. In international law such a reservation has no place, and a fraudulent root of title is as good as another where time has consecrated the original offence. It may be gravely doubted, however, whether in practice nations will submit to rules which bear hardly on their material interests, and which are easily evaded by reason of their vagueness. The difficulty is increased by the failure of international law to supply positively a generally applicable period of prescription. The provision that rights may be acquired by enjoyment for a period, 'whereof the memory of man runneth not to the contrary,' implicitly requires that it shall be determined how deep are the roots that bind human memory to the past. To say 'rights may be prescriptively acquired, the precise period of prescription is uncertain,' is merely to recommend academically acquiescence in the *status quo*. It is, however, useful to observe that in some degree every civilised nation must ultimately fall back upon a prescriptive root of title. The recognition of the fact is often obscurely made, yet to its

<sup>1</sup> Hall, 6th ed. p. 116n.

<sup>2</sup> *Précis*, § 70-1.

<sup>3</sup> *Le droit des gens moderne de l'Europe*, § 6.



influence may be traced that instinctive reverence for 'accomplished facts,' which, as a force making for tranquillity, is of incalculable international importance.

5. The nature of the rights involved in international ownership, or the *dominium eminens* of the state, is of course of a somewhat peculiar character, but as between two distinct communities, ownership may be described well enough in Austin's well-known words: 'The right over a determinate thing, indefinite in point of user, unrestricted in point of disposition, and unlimited in point of duration.' Such a right, though difficult to define positively, is familiar and intelligible enough in its general features. Greater difficulties beset the attempt to determine exactly the legal position where the claims are less exclusive: it is at this point that serious problems, already noticed from a slightly different point of view, are raised by the extensions of territory variously described as protectorates, spheres of influence, chartered company territory, and leasehold territory. It has been suggested already that a protected state controlled internally and externally by the protecting power has in fact become a part of its dominions, differing from the rest merely in the possession of a more likely prospect of future emancipation. A sphere of influence is the phrase vaguely used to describe an area which the power enjoying it wishes to possess but is not prepared immediately to occupy. It may be created by the unilateral act of one state or by agreement between two or more: and when created by agreement, the claim is frequently made that it must be respected even by those who have not been parties. Germany and Great Britain in 1886 agreed to draw a line in the Western Pacific and to refrain from interference with each other on either side of it. Germany in 1890 and the Congo State in 1894, by agreements with Great Britain, recognised a British sphere of influence extending to 'the western watershed of the basin of the Upper Nile':<sup>1</sup> and in the negotiations which followed the Fashoda incident in 1898, Great Britain set up a case of acquiescence, after notice, on the part of France, but the matter was settled by a farther delimitation of spheres of influence between Great Britain and France, without

Prescription.

Rights of Ownership.

Spheres of Influence.

<sup>1</sup> Westlake, *International Law*, Part I. p. 130: Hertslet, *Map of Africa by Treaty*, p. 642.

Spheres of Influence.

any decisive conclusion on principle being arrived at. To proclaim a sphere of influence is in fact to say 'hands off' to possible competitors. No powerful state would allow foreign interference within the area of a sphere of influence, and the attempt to interfere would probably be treated as a *casus belli*: in these circumstances it is both convenient and accurate to include such spheres among the territorial belongings of a state. A further development of the tendency to assume vague and indefinite rights over areas of territory not occupied by the state which claims the rights, is to be found in the agreements made between China on the one hand and Great Britain, France and Japan on the other, in 1897 and 1898, by which China agreed not to alienate certain parts of her territory; each power thereby establishing a sort of prior claim in the event of the breaking-up of the Chinese Empire. The latest concession to international sensitiveness is to be found in the 'leasehold interests' which the delicacy of continental diplomacy has introduced in the far East, and for which precedents are to be found in the dealings between Great Britain and Zanzibar and Great Britain and the Congo State. The political advantage of such 'leases' is to be found in the easy graduation of the assimilative process, but their legal importance is not considerable. At a given moment, authority and jurisdiction are resident either with the power which grants, or with that which receives, the lease. In the first case concessions of unusual scope and vagueness, but fully consistent with a continuance of the prior ownership, have been conventionally made; in the second there has been an actual transfer of territory from one power to the other. A rough but usually sufficient test is the incidence of responsibility to foreign powers. If a European country obtains a 'lease' from China, fortifies its acquisition, and undertakes responsibility within its limits, no devices of nomenclature can disguise the change which has been covertly effected.

Leases.

## 2. RIGHTS OVER WATER

The Ocean.

6. For many centuries the ocean was generally admitted to be a possible subject of national appropriation. The char-



acter of the pretensions put forward was well stated by The Ocean. Cockburn, C.J., in *The Queen v. Keyn*:<sup>1</sup>—

‘. . . From an early period the kings of England, possessing more ships than their opposite neighbours, and being thence able to sweep the channel, asserted the right of sovereignty over the narrow seas, as appears from the commissions issued in the fourteenth century, of which examples are given in the Fourth Institute, in the chapter on the Court of Admiralty, and others are to be found in Selden’s *Mare Clausum*, Book 2. At a later period still more extravagant pretensions were advanced. Selden does not scruple to assert the sovereignty of the King of England over the sea as far as the shores of Norway, in which he is upheld by Lord Hale in his treatise, “De jure maris,” Hargrave’s *Law Tracts*, p. 10.

‘In the reign of Charles II. Sir Leoline Jenkins, then the Judge of the Court of Admiralty, in a charge to the grand jury at an Admiralty Sessions at the Old Bailey, not only asserted the King’s sovereignty within the four seas, and that it was his right and province “to keep the public peace on these seas”—that is, as Sir Leoline expounds it, “to preserve his subjects and allies in their possessions and properties upon these seas, and in all freedom and security to pass to and fro on them, upon their lawful occasions,” but extended this authority and jurisdiction of the king:—

“To preserve the public peace and to maintain the freedom and security of navigation all the world over, so that not the utmost bound of the Atlantic Ocean, nor any corner of the Mediterranean, nor any part of the South or other seas, but that if the peace of God and the King be violated upon any of his subjects, or upon his allies or their subjects, and the offender be afterwards brought up or laid hold of in any of His Majesty’s ports, such breach of the peace is to be inquired of and tried in virtue of a commission of oyer and terminer as this is, in such country, liberty, or place as His Majesty shall please to direct—so long an arm hath God by the Laws given to his vice-regent the King.”

‘To be sure, this learned civilian, as regards these distant seas admits that other sovereigns have a concurrent jurisdiction, which, however, he by no means concedes to them in these so-called British seas. In these the refusal by a foreign ship to strike the flag and lower the topsail to a King’s ship he treats as amounting to piracy.

‘Venice, in like manner, laid claim to the Adriatic, Genoa to the Ligurian Sea, Denmark to a portion of the North Sea. The

<sup>1</sup> 2 Exchequer Division, 63, pp. 174-5.



The Ocean.

Portuguese claimed to bar the ocean route to India and the Indian seas to the rest of the world, while Spain made the like assertion with reference to the West.'

7. The claim was sometimes pushed to practical consequences. Thus, in 1636, England compelled the Dutch to pay £30,000 for the privilege of fishing in the German Ocean, and more than one war between England and Holland sprang from the Dutch refusal to lower their flag in recognition of the maritime sovereignty of the former country. Until 1805 British naval officers were instructed by the Admiralty regulation to compel foreign ships to 'strike their topsail and take in their flag' within the king's seas, which were declared to extend to Cape Finisterre. But, as Cockburn, C.J., expressed it, 'these vain and extravagant pretensions have long since given way to the influence of reason and common-sense,'<sup>1</sup> and the American attempt to revive them at one stage of the Alaska Territory dispute was not seriously pressed. The American claims to an extent of water 1500 miles by 700 were, ironically enough, derived from a Russian ukase, the revocation of which the United States had been instrumental in procuring. The arbitration tribunal, which gave its decision in 1893, made short work of the attempt to extend the territorial jurisdiction of Alaska. *Nemo dat quod non habet*, and the Emperor Alexander I. could not pass on to the United States jurisdiction which he himself had illegally assumed. It may now be stated quite generally that the sea lies open to the unimpeded navigation of all, but that an exclusive jurisdiction may be asserted by each country over that portion of it which is closely adjacent to its own territory. The precise extent of the area covered by this qualification was not unnaturally a source of contention

<sup>1</sup> *Ibid.*, p. 175. As lately, however, as 1837, Captain Furneaux, R.N., in his *History of Treaties*, observes (Preface, xiii): 'The limits of the British jurisdiction on the seas extend generally from Cape Stadelard in Norway to Cape Finisterre. . . . In having permitted a silence in most of her treaties at the termination of the late war . . . on the question of nations navigating unconditionally in the British seas, England has evinced a spirit of moderation, and proved that she does not contend for a vexatious exercise of power.' The writer judiciously adds: 'It is to be hoped the blessings of peace may long permit us to regard these questions as of no vital importance to the interests of Great Britain.'

among the earlier jurists.<sup>1</sup> Albericus Gentilis allowed one hundred miles from shore, Valin as far as the lead line could find bottom, while Baldus and Bodin were content with sixty miles. The principle already indicated by Grotius was clearly stated by Bynkershoek, 'Potestatem terræ finiri ubi finitur armorum vis.'<sup>2</sup> Control over the sea, he elsewhere says, extends 'quousque tormenta exploduntur.'<sup>3</sup> The same writer proposed the three-mile limit, which has since been generally adopted. It is, however, material to notice that the limit was appointed in reliance upon data which are no longer applicable; *cessante legis ratione cessat et ipsa lex*, and it is contended that it is reasonable to extend the area of control coincidently with the increasing range of artillery. Thus the *Traité des Prisés Maritimes*, published in 1855, lays it down that the *portée du canon* is the proper limit of territorial waters, and in 1894 the Institute of International Law unanimously recommended that the limit be six miles. In the latest case in which the question has come up for consideration (the Newfoundland Fisheries Arbitration of 1910) the three-mile limit was prescribed by treaty, and therefore no question as to its reasonableness arose.<sup>4</sup>

8. With regard to bays and gulfs, in theory their character as territorial or free is a matter of measurement, the material point being their width at the mouth; but by ancient usage certain bays or gulfs, such as those of Conception<sup>5</sup> (British), Chesapeake and Delaware (American), and Cancale (French), have a national character, though far wider than six

The Ocean.

Bays, Gulfs  
and Straits.

<sup>1</sup> Massé very sensibly observes: 'C'est du reste, un point fort difficile à décider en théorie pure, que celui de savoir quelle est l'étendue de la mer littorale.'

<sup>2</sup> Land control ends with the range of weapons.

<sup>3</sup> As far as the range of offensive weapons.

<sup>4</sup> See Part IV., Chap. X., *infra*, for an account of this arbitration. While this book was in the press a question arose from a claim made by Russia to extend, by legislative enactment, the limits of Russian sovereignty over the White Sea to twelve miles. (See particularly the *Times*, Feb. 25, 1911.) Russia apparently relies on certain precedents in which Great Britain, France, and the United States have extended the customs zone beyond the three-mile limit; and upon the general principle that the limit is the range of modern artillery. The case seems one eminently suited for arbitration at the Hague: and it is hardly necessary in a short text-book to express any definite opinion as to whether the weight of authority and practice supports the claim to such an extension.

<sup>5</sup> Direct United States Cable Co. v. Anglo-American Telegraph Co. L.R. 2 A.C. 394.



Bays, Gulfs and Straits.

miles at their entrance. A somewhat more extensive claim is believed to be made, though its validity is doubtful, 'in respect to those portions of the sea which form the ports, harbours, bays and mouths of rivers of any state where the tide ebbs and flows';<sup>1</sup> thus under the name of the King's Chambers it is believed that this country claims jurisdiction over the water enclosed between straight lines drawn from headland to headland. A similar claim, but one proportionately more imposing, was put forward by Chancellor Kent<sup>2</sup> on behalf of the United States:—

'Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as for instance from Cape Ann to Cape Cod and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, and from the south cape of Florida to the Mississippi. It is certain that our Government would be disposed to view with some uneasiness and sensibility, in the case of war between other maritime powers, the use of the waters of our coast, far beyond the reach of cannon-shot, as cruising ground for belligerent purposes.'

With this view, however, may be compared the opinion expressed by an American Secretary of State in 1875, in a despatch to this country:—

'We have always understood and asserted that pursuant to public law no nation can rightfully claim jurisdiction beyond a marine league from its coast.'

In the Newfoundland Fisheries Arbitration of 1910, it was decided that the three-mile limit was to be measured in the case of a bay from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay: but as this finding was recognised to be so vague as to leave the door open to disputes in practice, a number of bays in New Brunswick, Nova Scotia and Newfoundland were specifically dealt with in

<sup>1</sup> Wheaton, § 188, 1.

<sup>2</sup> Ed. 1844, *Commentaries*, vol. i. p. 29.



detail, and it was suggested that in other cases the line should be drawn across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles. This ten-mile rule had been adopted by Great Britain as the test whether the fishing was reserved to nationals in treaties with France and Germany and in the North Sea Convention, and had been proposed by her in the course of negotiations with the United States.<sup>1</sup>

Bays, Gulfs and Straits.

Through straits narrow enough to lie entirely within the territorial area there is the right of innocent passage for all vessels, unless the strait is merely the entrance to an inland sea, wholly surrounded by the territory of one state, and therefore belonging to that state. Such was the condition of the Bosphorus before 1774, when the Black Sea was wholly Turkish and passage was forbidden to all vessels.

9. In deciding on the ownership of rivers which divide two states, various rules have been adopted. The oldest method, derived from the Roman law, was to take the middle line of the water: a later method was to take the course of the strongest current (the *Thalweg*, or 'downway'); and in some cases, either by convention or prescriptive right, one state is entitled to the whole river.<sup>2</sup> A difficulty has been sometimes felt in dealing with those rivers whose waters flow over the territory of more than one country. The riparian inhabitants of a stream which disembogues itself into the sea in foreign territory are deeply concerned to maintain an open passage; and this interest combining with a general perception that wantonly to deny such passage was an unfriendly act, has introduced some confusion into the law. Grotius himself and many of his most eminent successors failed to distinguish between the obligations of comity and of law, and based the right of free navigation on the principle of 'natural right.' Vattel recognises a right, but calls it 'imperfect'; a not very happy way of saying that in his opinion, free river transit should be enforceable from all nations, but in fact is not. The *jus innoxii transitus*<sup>3</sup> has been several times alleged by American diplomatists. In 1783, in a dispute with Spain over the closing of the

Rivers.

<sup>1</sup> See Part IV., Chap. X., *infra*.

<sup>2</sup> Westlake, *International Law*, Part I. pp. 141, 142.

<sup>3</sup> Right of innocent passage.

## Rivers.

Mississippi, the freedom of rivers to 'riparian inhabitants was declared to be a sentiment written in deep character in the heart of man,' a reference to authority which recalls the older appeals to the law of nature. In the St. Lawrence dispute between the United States and this country in 1824, the same claims were supported by similar arguments. 'The right of the upper inhabitants to the full use of a stream rests upon the same imperious want as that of the lower, upon the same inherent necessity of participating in the benefit of the flowing element.'<sup>1</sup> These somewhat rhetorical statements are hardly supported by either theory or practice; on the face of it the claim is exceptional, and an undischarged onus rests upon those who affirm it; in practice it has not been admitted, and the right of transit has been ordinarily secured by convention. The parties to the Treaty of Paris in 1814 declared the Rhine free, and expressed a hope that all rivers traversing different states should be free to the world, but the Congress of Vienna in the following year used language which apparently restricted this freedom to freedom of commerce, not of navigation, among the co-riparian states, not the nations of the world; though the wider construction was put upon it by the Treaty of Paris in 1856, which applied the principles of the Congress of Vienna to the Danube, and declared that no toll should be levied which was founded solely upon the fact of the navigation of the river, and no duty upon the goods on board the vessels, and that apart from police and quarantine regulations (which were to impose as little hindrance as possible) no obstacle should be opposed to free navigation.<sup>2</sup> In 1831 the freedom of the Scheldt, which had been established by a decree of the French Convention in 1792, was reaffirmed by the treaty of separation between Belgium and Holland. The Treaty of San Lorenzo el Real in 1795 finally opened the whole of the Mississippi to American navigation after a long dispute with Spain, which claimed exclusive rights for a considerable distance above the river's mouth;<sup>3</sup> but this river is now entirely in the territory of the United States. The St.

<sup>1</sup> *British and Foreign State Papers*, 1830-31, pp. 1065-1075, see Hall, 6th ed. p. 133.

<sup>2</sup> Westlake, *International Law*, Part. I. p. 146.

<sup>3</sup> Wheaton, *International Law*, 3rd ed. p. 298.



Lawrence controversy, already referred to, was settled in 1854 by a treaty between this country and the United States, under which the American Government purchased the freedom of the St. Lawrence by throwing open Lake Michigan to English commerce, and by the Treaty of Washington in 1871 this river was declared to be for ever free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations not inconsistent with the privilege of free navigation.

### 3. RIGHTS OVER MISCELLANEOUS OBJECTS

10. Under this head must be shortly considered the rights which states possess over property which is not situated within the territory, whether or not such property is within the jurisdiction of another state. In this class fall all vessels, public and private, which are outside the territorial waters of the country whose flag they fly. Jurisdictional rights over ships will require treatment elsewhere, but it is convenient to notice in this place the general character of such vessels.

Public vessels are all vessels in the exclusive employment of the state whether such employment be permanent or occasional. The public character of the vessel must be established by such a commission to the commander as will be recognised in his own country. The production of his commission by the commanding officer is sufficient evidence of the character of his vessel, and in practice his word is usually accepted. When the United States Government protested against the reception of the *Sumter* in Curaçao Harbour, the Dutch Government attempted to evade responsibility by the contention that 'le gouverneur néerlandais devait se contenter de la parole du commandant couchée par écrit.'<sup>1</sup> An affirmation by a Government that a particular vessel is a public ship of the state is of course conclusive. Thus in the *Parlement Belge*,<sup>2</sup> Brett, L.J., delivering the judgment of the court, observed :—

<sup>1</sup> Ort, *Dip. de la Mer*, i. 183; Hall, 6th ed. p. 161.

<sup>2</sup> 5 P. D. at p. 219.



Public ships.

'The ship has been declared by the Sovereign of Belgium, by the usual means, to be in his possession as Sovereign, and to be a public vessel of the state. It seems very difficult to say that any court can inquire, by contentious testimony, whether that declaration is or is not correct. To submit to such an inquiry before the court is to submit to its jurisdiction. It has been held that if the ship be declared by the sovereign authority by the usual means to be a ship of war, that declaration cannot be inquired into. That was expressly decided under very trying circumstances in the case of the *Exchange*.<sup>1</sup> Whether the ship is a public ship used for national purposes seems to come within the same rule.'

A private ship, to make good its claim to nationality, must have conformed to the rules imposed by the state to which it claims to belong. Such rules will ordinarily deal with the flag under which it sails, or the nationality and domicile of its owners, and the question may be reserved for a later chapter.

<sup>1</sup> 7 Cranch. 116.

## CHAPTER III

### RIGHTS AND DUTIES INCIDENT TO JURISDICTION

THE subjects which require treatment under the head of jurisdiction are arranged in the following order :—

1. Jurisdiction within the Territory.
2. Exemptions from the above Jurisdiction.
3. Jurisdiction without the Territory.

#### 1. JURISDICTION WITHIN THE TERRITORY

1. A state enjoys rights of jurisdiction in varying degrees over (i) its natural-born subjects, until such persons have changed their nationality in a manner recognised by its laws ; (ii) naturalised subjects ; (iii) aliens resident in, or passing through, its territory.

2. Normally, of course, a child is born in the country to which its parents belong, and no question can arise as to its nationality. Where, however, it is born in a country in which its parents are aliens, two different views are possible. According to the first, which was at one time almost universally held, territorial considerations were paramount, and the child's nationality was determined by the place of its birth ; according to the second the decisive criterion was the nationality of the father, and the place of birth was treated as accidental. A rigid adherence to the earlier view would have involved the conclusion that a child born in France of an English mother on her way to Switzerland was a French subject, while the later would have made it possible to impress as British subjects naturalised American citizens of British extraction to the third or fourth generation. Both the territorial principle, and that which depended upon parentage, were, in fact, incapable of extreme logical applica-

Natural-born  
Subjects.

Natural born  
Subjects.

tion. It is not surprising to find that under these circumstances national practice varied. By the English common law all persons born on English soil or on board English ships of war even when in foreign harbours, or on board any English ship at sea, were British subjects, and statutory additions thereto declared the children and paternal grandchildren of natural-born subjects<sup>1</sup> to be themselves British subjects wherever born. And such nationality could not be affected by naturalisation elsewhere. In the language of Blackstone :—

‘It is a principle of universal law that the natural-born subject of one prince cannot by any act of his own—no not by swearing allegiance to another—put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first due. Indeed the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another, but it is his own act that brings him into these straits and difficulties of owing service to two masters; and it is unreasonable that by such voluntary act of his own he should be able at pleasure to unloose those bands by which he is connected to his natural prince.’<sup>2</sup>

Statute law has made great inroads upon this doctrine, but it still represents the general rule in England. The American view was similar, with an exception, however, in the case of the children of aliens whose residence is merely transient; though an Act of Congress passed in 1855 declared that the children of American fathers born abroad should themselves be American subjects. In Sweden, children of aliens born in Sweden become Swedish if they are domiciled in the country till the age of twenty-two. Austria, Germany, Denmark, Greece, Norway and Switzerland determine national character by reference to the father's nationality. Russian practice appears to be similar, with the addition that all persons born and bred on Russian soil are entitled to claim Russian nationality whatever their parentage. In Italy, the principle of free

<sup>1</sup> Cf. 7 Anne, c. 5, 4 George II., c. 21, 13 George III., c. 21.

<sup>2</sup> *Commentaries*, vol. i. p. 369; cf. also the judgment delivered by Coleridge, C.J., in *Isaacson v. Durant*, L.R. 17, Q.B.D. 58.



choice by the children of aliens prevails; but they are Italian Nationality, subjects when the father has been domiciled in the country for ten years, unless they elect to the contrary. In France, as Mr. Hall expresses it,<sup>1</sup> 'the law has been so modified by recent enactment<sup>2</sup> that its only apparent principle seems to be supplied by a desire to ascribe French national character to as large a number of persons as possible.' Pursuantly to this object it is provided that every child (including those of foreign parentage) born in France is to be deemed a French citizen, unless he has made a declaration of alienage in the year following the attainment of his majority. The children of French parents born abroad are French citizens unless naturalised elsewhere. Illegitimate children, by the law of almost all states, follow the nationality of their mother: but in English law in this case the place of birth is the criterion. The nationality of a married woman is almost universally the nationality of her husband. Most states now provide that the children of aliens born in their territories may retain their nationality by making a declaration of alienage on or after attaining majority, a provision which meets the most serious inconveniences of the territorial theory. The opinion, however, which bases allegiance upon parentage, especially when combined with the view cited from Blackstone that the individual cannot at will dissolve his national ties, may still give rise to controversy. Although the practice is becoming general for each state to prescribe the conditions under which its own citizens are at liberty to change their nationality, circumstances are still conceivable under which the same person may owe allegiance to more than one state according to the laws of each. The war between this country and the United States in 1812 sprang from the British attempt to impress Englishmen naturalised in the United States. Claims similar in character, though not in extent, were put forward till late in this century, when the English law was changed by the Naturalisation Act of 1870, and it was at last formally recognised that a British subject naturalised abroad ceased to be of British nationality.<sup>3</sup> The

<sup>1</sup> 6th ed. p. 224.

<sup>2</sup> The laws of June 26, 1889, and July 23, 1893.

<sup>3</sup> But a British subject may not become naturalised during a war, in an enemy state: the act of becoming so naturalised is an act of treason (*R. v. Lynch*, 1903, 1 K.B. 444).

## Nationality.

conflict was between those who affirm a 'right of expatriation,' and those who maintained with Blackstone the doctrine of indissoluble allegiance: *nemo potest exuere patriam*.<sup>1</sup> American statesmen have at different times taken different views. On at least one occasion the doctrine of inalienable allegiance has been affirmed by the Supreme Court, but in 1868 an Act of Congress declared that 'the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness.' This resolution is hardly consistent with the most authoritative practice. Many states recognise the claims of the *patria originis* by the refusal to naturalise except where the consent of that country has been given: it is, moreover, the general practice among European nations to impose conditions on the act of expatriation, a practice not to be reconciled with the existence of the absolute right alleged.<sup>2</sup> Finally a study of recent controversies suggests that expatriation made without permission would not be held in any country to protect a person naturalised elsewhere from the consequence of obligations incurred previously to naturalisation. If these considerations are well founded, each state has the right of determining the conditions under which its citizens shall be at liberty to leave it. Occasions of controversy are not likely to occur in future, unless the person naturalised has failed to comply with these conditions, and in such a case the country of adoption is not entitled to intervene between its new subject and his country of origin.

## Naturalised Subjects.

3. The naturalisation laws of each state naturally vary in details, and particularly in the length of previous residence required. In a work of this scope it is not possible to give an account of the rules which obtain in foreign systems, but a short statement of the effect of the English Naturalisation Act 1870<sup>3</sup> may usefully be added.

Sections 2, 3 deal with the status of aliens. Section 4 is as follows :—

'Any person who by reason of his having been born within the dominions of Her Majesty is a natural-born subject, but who also, at

<sup>1</sup> No man can divest himself of his nationality.

<sup>2</sup> Hall, 6th ed. pp. 227, 231.

<sup>3</sup> 33 Vict. c. 14.



the time of his birth, became under the law of any foreign state a subject of such state, and is still such subject may, if of full age and not under any disability, make a declaration of alienage . . . and such person shall cease to be a British subject. Any person who is born out of Her Majesty's dominions of a father being a British subject may, if of full age, and not under any disability, make a declaration of alienage and . . . shall cease to be a British subject.'

Section 6 provides that any British subject who has become, or shall become, voluntarily naturalised in a foreign state while resident there, shall cease to be a British citizen and become an alien. Section 7 provides that an alien who has resided in the United Kingdom for a term of five years, or has been in the service of the Crown for a like period, and purposes to continue such residence or service, may apply to a Secretary of State for a certificate of naturalisation. Section 8 contains provisions for the readmission to citizenship of 'statutory aliens,' or persons who have abandoned their nationality pursuant to the Act, and for the purposes of this section, residence in any British possession will be equivalent to residence in the United Kingdom. Section 10 deals with the national status of married women and children. A married woman is deemed to be a subject of the state of which her husband is, for the time being, a subject. A widow, being a natural-born British subject who has become an alien through marriage, is treated as a 'statutory alien,' and may be readmitted to citizenship accordingly. Where a father being a British subject, or a mother being a British subject and a widow, becomes an alien in pursuance of the Act, his or her child who during infancy has become resident in the country where such father or mother has become naturalised, and has become naturalised in that country according to its laws, is deemed a subject of that country: on such father or mother obtaining a certificate of readmission, the child, who during infancy has become resident in the British dominions, also resumes British nationality: and the child of a father or mother (being a widow) who has become naturalised, also becomes naturalised if resident during infancy in the United Kingdom with such father or mother. The effect of section 15 is that the loss of British nationality



Naturalisation.

does not discharge from liability for previous acts. Section 16 enables the legislature of any British possession to pass laws 'for imparting to any person the privileges, or any of the privileges, of naturalisation to be enjoyed by such person within the limits of such possession.'

Aliens domiciled  
in or passing  
through the  
Territory.

4. The legal effects of domicile assume importance in connection with the rules of war. It is sufficient here to notice that the nature of the jurisdiction which may be asserted over persons domiciled in a foreign country by the Government of that country differs only in degree, and not in character, from that which is exerciseable over aliens passing through the territory. Both alike are *subditi temporarii*, and are subject to taxation and amenable to the criminal jurisdiction for acts committed within its area. They are not liable to military service, except perhaps in defence of the country against uncivilised enemies, or such service as is necessary for the maintenance of social order, and is of the nature of police service. So recently as 1897, an attempt was made by Belgium to compel aliens to serve in the civic guard, but this was abandoned in deference to protests from other powers. On principle this immunity ought not to be affected, in the case of domiciled persons, by an expression of intention to become citizens of the state in which they reside. It seems, however, to have been admitted in the negotiations between this country and the United States in 1863 that resident foreigners who had made known such an intention might be subjected to the obligation of military service as an alternative to leaving the country within a reasonable period. No right to protection, as against the country of allegiance, or indeed as against third powers, can be based upon a residence which falls short of naturalisation; and the American claim in the case of Martin Koszta, that a domiciled foreigner, who had made a statutory declaration of intention to become a citizen of the United States, was entitled to the same protection as a fully naturalised person, was consistent neither with principle nor with authority. The action of the United States was defended by an untenable claim that domicile confers national character; but Professor Westlake suggests that it may be justified on the ground put forward in a dispatch by Mr. Bayard on August 5, 1885. 'The criterion . . . with respect to aliens who have declared but not lawfully perfected

their intention to become citizens of the United States, is very simple. When the party after such declaration evidences his intent to perfect the process of naturalisation by continued residence in the United States as required by law, this Government holds that it has a right to remonstrate against any act of the Government of original allegiance whereby the perfection of his American citizenship may be prevented by force, and original jurisdiction over the individual reasserted.<sup>1</sup> The principle was admitted not to be applicable to the case of a man who having declared his intention of obtaining American nationality, immediately established a commercial domicile in the country of original allegiance.<sup>2</sup>

## 2. EXEMPTIONS FROM THE ABOVE JURISDICTION

5. International comity and convenience have given rise to several exemptions from the jurisdictional rights above described. Thus a foreign sovereign and his suite are not amenable to the jurisdiction of a state in the territory of which they may happen to be. As Lord Langdale expressed it in *Duke of Brunswick v. King of Hanover*<sup>3</sup>: 'There are reasons for the immunities of sovereign princes at least as strong if not much stronger than any which have been advanced for the immunities of ambassadors.' So Vattel<sup>4</sup>: 'S'il est venu en voyageur, sa dignité seule, et ce qui est dû à la nation qu'il représente et qu'il gouverne, le met à couvert de toute insulte, lui assure des respects et toute sorte d'égards, et l'exempte de toute juridiction.'<sup>5</sup> This exemption is complete:<sup>6</sup> it covers not only all civil and criminal jurisdiction, but all payment of taxes, and even all police regulations. The only remedy against a foreign sovereign if he breaks the law is to expel him. On the other hand (though opinion on this point is not unanimous<sup>7</sup>), he may not exercise any jurisdiction of his own, even between members of his own suite,

<sup>1</sup> Westlake, *International Law*, Part I. p. 200.

<sup>2</sup> *Ibid.*, p. 201.

<sup>3</sup> 6 Beav. at p. 50.

<sup>4</sup> Lib. iv. c. 7, 8, 108.

<sup>5</sup> Cited at p. 206 of the judgment in the *Parlement Belge*, 5 P.D.

<sup>6</sup> See *De Haber v. The Queen of Portugal*, 20 L.J.Q.B. 488; *Mighell v. Sultan of Johore*, 1894, 1 Q.B. 149.

<sup>7</sup> Hall, 6th ed. p. 169*n*.



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in foreign territory: nor can he grant asylum to a person not a member of his suite. If, however, he applies to the local courts, he thereby submits to their jurisdiction and may be met by a counterclaim.<sup>1</sup> If he holds property, he may be subject to the extent of that property to the jurisdiction of the country in which it is situated; and, if he, though a sovereign in one country, is a subject in another, he probably cannot claim exemption from his liabilities in the latter capacity.<sup>2</sup> The immunities of diplomatic agents have been already considered,<sup>3</sup> and by way of final exception may be mentioned the privileges conceded by the practice of nations to armed forces and public vessels of foreign powers while within the state territory. Occasions for the concession to the former are naturally rare, but the freedom from jurisdiction has been repeatedly affirmed; in the case of public vessels, practice has varied greatly though the law is now well settled in favour of the immunity. At the end of the eighteenth century the United States claimed the right to board a foreign war-vessel (British) and remove from it American subjects;<sup>4</sup> and though great Britain protested in that case, the British view as expressed by Lord Stowell in 1820<sup>5</sup> seems to have been much to the same effect. But opinion was by no means unanimous, and the luminous judgment of Marshall, C.J., in the American case, *The Exchange v. M'Fadden*<sup>6</sup> (1810) had much to do with the consolidation of the doctrine of immunity:—

<sup>4</sup> [A public armed ship] constitutes a part of the military force of her nation: acts under the immediate and direct command of the sovereign: is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and dignity. The implied licence therefore under which such vessel enters a friendly port may reasonably be construed, and it seems to the court ought to be construed, as containing an exemption from the jurisdiction of the sovereign within whose territory she claims the rights of

<sup>1</sup> *South African Republic v. La Campagne Franco-Belge, etc.*, L.R., 1893, 1 Ch. 90.

<sup>2</sup> Hall, 6th ed. p. 169.

<sup>4</sup> Hall, 6th ed. p. 186.

<sup>6</sup> 7 Cranch, 478.

<sup>3</sup> See p. 43, *supra*.

<sup>5</sup> *Ibid.*, p. 188.



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hospitality. . . . Certainly in practice nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.<sup>1</sup> Foreign Public Ships.

In the case of the *Silka* in 1856 the American view had so far hardened that even the doubtful doctrine was confidently asserted (in favour of a foreign vessel) that a foreign public ship is part of the territory of her state,<sup>2</sup> and Great Britain has steadily upheld in theory the right of asylum on British warships, while conceding that it ought not to be granted to ordinary criminals.<sup>3</sup> The more important European states appear to insist upon the principle of exterritoriality. The immunity, it is to be noted, applies to all public vessels, whether ships of war or not;<sup>4</sup> and it does not apply to the officers or crew if they leave the ship.<sup>5</sup> In the case of private vessels it may be taken as a general principle that no such immunity from the local jurisdiction exists; but it is a common practice for the local courts not to take cognisance of matters happening on board, affecting only the internal discipline of the ship and its crew and not disturbing the peace of the port. But it cannot be said that there is any rule of international law establishing this exception.<sup>6</sup>

### 3. JURISDICTION WITHOUT THE TERRITORY

6. This jurisdiction may be conveniently considered under the following heads:—

- i. Jurisdiction over subjects in foreign countries.
- ii. Jurisdiction over public ships wherever situate.
- iii. Jurisdiction over private ships on the high seas.
- iv. Jurisdiction over pirates.

#### 1. Jurisdiction over Subjects in Foreign Countries

7. The jurisdiction over subjects resident in Eastern countries has been already described,<sup>7</sup> and depends entirely

<sup>1</sup> 7 Cranch, at p. 487.

<sup>2</sup> Hall, 6th ed. p. 190.

<sup>3</sup> *Ibid.*, p. 191.

<sup>4</sup> Cf. *The Parlement Belge*, L.R., 5 P.D., 197; Westlake, *International Law*, Part I. p. 255.

<sup>5</sup> Westlake, *Ibid.*, p. 257; Hall, 6th ed. p. 196.

<sup>6</sup> Westlake, *Ibid.*, p. 260, 261; Hall, 6th ed., p. 201. <sup>7</sup> See p. 49, *supra*.

Subjects Abroad. upon convention. Jurisdiction is also claimed by most states over offences against their municipal laws committed by their subjects in foreign countries. By the English common law and by American law crime was, as it is technically expressed, 'local,' *i.e.*, justiciable only where committed, but a long succession of English and American statutes has added to the list of offences committed abroad for which criminals of these countries may be called to account by the courts of their own countries. Treason,<sup>1</sup> murder,<sup>2</sup> homicide, and bigamy<sup>3</sup> are the principal offences which have been so dealt with in England. It need hardly be said that the jurisdiction can only be made effective if the offender re-enters the country of his allegiance, for no nation can arrest any person upon the territory of another.<sup>4</sup>

Extradition. 8. Connected with the subject now under discussion is that of extradition, or the recovery for justice of criminals who have fled to a foreign country to escape from the consequences of their crimes. It is impossible to allege, as so many jurists have done, that there exists, apart from treaty, a common law right to demand the extradition of criminals. Had such a right existed, there would have been no occasion for the great number of treaties by which it has been expressly secured,<sup>5</sup> though it may perhaps be admitted, in the words of Professor Westlake, that 'this general adoption of the treaty method does not imply that a state would be held free to make its territory a shelter for fugitives from justice, and thereby a nuisance to its neighbours.'<sup>6</sup> Lord Russell of Killowen<sup>7</sup> based the law of extradition 'upon the broad principle that it is to the interest of civilised communities that crimes, acknowledged to be such, should not go unpunished, and it is part of the comity of nations that one state should afford to another every assistance towards bringing persons guilty of such crimes to justice.' In most countries special legislation is necessary in order that an extradition treaty can be put into effect. As Lord Brougham said in the House of Lords in 1842 when the Creole case was

<sup>1</sup> 25 Edw. 3. st. 5, c. 2.<sup>2</sup> 24 and 25 Vict. c. 100. § 9.<sup>3</sup> 24 and 25 Vict. c. 100, § 57.<sup>4</sup> See p. 53, *supra*.<sup>5</sup> Heffter, *Europäische Völkerrecht*, § 63.<sup>6</sup> Westlake, *International Law*, Part I. p. 243.<sup>7</sup> In *re Arton*, 1896, 1 Q.B. at p. 111.



under discussion: 'What right existed, under the municipal law of this country, to seize and deliver up criminals taking refuge there? What right had the Government to detain, still less to deliver them up? Whatever right one nation had against another nation—even by treaty which would give the strongest right—there was by the municipal law of the nation no power to execute the obligation of the treaty.'<sup>1</sup>

9. A full account of extradition practice would far exceed the scope of this work, but the English rules may be briefly stated, to illustrate the principles involved. The right to deliver up criminals, or recover them, as the case may be, depends municipally upon four statutes.<sup>2</sup> Internationally it is secured by about forty treaties with different foreign powers, comprehending almost all the graver offences. The first condition precedent to extradition is a requisition from a diplomatic representative of the state seeking it, made in respect of one of certain specified 'extradition crimes,' to the list of which bribery has recently been added. This requisition is addressed to a Secretary of State, whose duty it is to determine whether the crime in question is of a political nature. Section 3 (1) of the Act of 1870 provides that 'a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on *habeas corpus*, or to the Secretary of State, that the requisition for his surrender has, in fact, been made with a view to try or punish him for an offence of a political character.' The meaning of this qualification was much discussed *In re Castioni*.<sup>3</sup> Denman, J.,<sup>4</sup> observed: 'The question is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character, with a political object, and as part of the political movement and rising in which he was taking part.' Hawkins, J.,<sup>5</sup> cited with approval the observations contained in Stephen's *History of the Criminal*

<sup>1</sup> Forsyth Cases and Opinions in Constitutional Law, *cf.* Kent's *Commentaries*, §§ 39-42. Ed. 8.

<sup>2</sup> 33 and 34 Vict. c. 52, 36 and 37 Vict. c. 60, 58 and 59 Vict. c. 33, and 6 Ed. vii. c. 15 (which added bribery to the list of extradition crimes).

<sup>3</sup> [1891] 1 Q.B. 149.

<sup>4</sup> *L.c.*, at p. 159.

<sup>5</sup> *L.c.*, p. 165.



Extradition.

*Law* :<sup>1</sup> 'I think therefore that the expression in the Extradition Act ought to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances.' Stress, however, was laid by the court upon the fact that a crime committed in the course of 'a political disturbance' is not necessarily political in character: and it has also been decided<sup>2</sup> that an anarchist crime is not political, for to constitute that character 'there must be two or more parties in the state, each seeking to impose the government of their own choice on the other.

10. The alleged criminal may be arrested either on a warrant issued by a police magistrate on receipt of an order from the Secretary of State, and on such evidence as would justify the issue of a warrant if the crime had been committed in England, or by a police magistrate or Justice of the Peace on such information or complaint and on such evidence as would justify its issue if the crime had been committed within his jurisdiction: in the latter case a report is at once made to the Secretary of State, who may order the warrant to be cancelled, or may send to the police magistrate before whom the prisoner is brought an order signifying that a requisition has been made for his surrender. If the Secretary of State decides that the offence is political, he may refuse to send any order, or may at any time order the accused to be discharged, or the prisoner may, by proceedings on a writ of *habeas corpus* obtain his release on that ground. The prisoner is committed to prison to await extradition if there is evidence which would in an English case justify his committal for trial; but he is not to be surrendered for a period of at least fifteen days after committal, and if he is not surrendered within two months, a judge of the High Court has power to order his discharge. It is to be noted, too, that he is not to be surrendered unless provision is made by the law of the state claiming him, or by arrangement, that he shall not be detained or tried for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded,

<sup>1</sup> Vol. ii. pp. 70, 71.

<sup>2</sup> *In re Meunier*, 1894, 2 Q.B. at p. 419.

unless in the meanwhile he has been restored or had an Extradition opportunity of returning to British territory.<sup>1</sup>

### 2. *Jurisdiction over Public Ships*

11. This question has been already dealt with from the Public Ships point of view of the state into whose territory the public ship of another state comes, and the exemption of such ship from the local jurisdiction involves as its correlative the exclusive sovereignty of the state of its allegiance. By the fiction of 'extritoriality,' public ships are, so to speak, detached fragments of the country to which they belong, carrying with them its privileges and immune from alien jurisdiction. But there is serious doubt as to the value of any such fiction,<sup>2</sup> though it gives a fair idea of the immunities which public ships enjoy, and may be safely employed to describe existing facts, if not as a basis for deductive reasoning. If a foreign public ship disturbs the peace of the port which grants it hospitality, it may undoubtedly be required to depart: but it is in itself inviolable. Any interference with it is now generally agreed to be an act of war, and satisfaction for any wrong which it commits must be obtained by diplomatic action against the Government by which it is commissioned or employed.

### 3. *Jurisdiction over Merchant Ships*

12. Every state possesses jurisdiction over its merchant Merchant vessels and their crews and all persons upon them, whether Ships. subjects or not, while upon the high seas, for the reason that there is no other authority possessing a higher claim. Here the facts fall far short of the fiction of territoriality, for the jurisdiction of origin gives way in case of conflict as soon as the vessel arrives within the territorial waters of another state, and for an offence committed by or on board her in territorial waters, she can be pursued into and seized or boarded upon the open seas, if the pursuit began when she was in territorial waters or had only just left them.<sup>3</sup> It was

<sup>1</sup> The general principles of extradition were laid down in a series of resolutions adopted by the Institute of International Law at Oxford in 1880 and Geneva in 1892 (see Westlake, *International Law*, Part I. p. 244 *et seq.*).

<sup>2</sup> Cf. Hall, 6th ed. p. 247.

<sup>3</sup> Hall, 6th ed. p. 252.



Merchant Ships.

even argued by the United States in the Behring Sea Arbitration (1893) that a state has a jurisdiction for an indefinite distance beyond its territorial waters for purposes of self-protection, a jurisdiction not limited to cases of emergency: but the contention was not supported by precedent and was not accepted as valid.<sup>1</sup> If, however, the local jurisdiction is not asserted, the state to which the vessel belongs may properly exercise its concurrent jurisdiction. The earliest statutes in this country on the subject of Admiralty jurisdiction are 3 Rich. II. c. 3, and 15 Hen. VIII. c. 15, and the English view was well expressed by Bovill, C.J., in the *Queen v. Anderson*:<sup>2</sup>—

‘When our vessels go into foreign countries, we have the right, even if we are not bound, to make such laws as to prevent disturbances in foreign ports, and it is the right of every nation which sends ships to foreign countries to make such laws and regulations. . . . The place where the vessel was lying was in a navigable river, in a broad part of it below all bridges, and at a point where the tide ebbs and flows, and where great ships lie and hover. What difference is there between such a place and the high seas? The cases clearly show that the Admiralty has jurisdiction in such a place; if so, the case stands precisely the same as if the offence had been committed upon the high seas.’

In that case the British Court exercised jurisdiction though the offence had been committed in French territorial waters.

#### 4. *Jurisdiction over Pirates*

13. Pirates are sometimes described as *hostes humani generis*, a description which is, however, not entirely accurate, as the term pirate is applied to those who commit acts of war against one state only, without themselves deriving authority from any state. In this case other states do not as a rule interfere unless directly affected: but, in general, pirates are justiciable, as Sir L. Jenkins puts it, ‘being reputed out of the protection of all laws and privileges . . . in what parts soever they are found.’<sup>3</sup> Sir Charles Hedges, Judge of the High Court of Admiralty, in his charge to the grand jury in *Nix v. Dawson*,<sup>4</sup> gave the following definition of piracy.

<sup>1</sup> Hall, 6th ed. p. 252.

<sup>3</sup> *Works*, vol. ii. p. 714.

<sup>2</sup> L. R. 1 C. C. R. 166.

<sup>4</sup> 13 St. Tr. 654.



'Piracy is only a sea term for robbery, piracy being a robbery within the jurisdiction of the Admiralty. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself or any of the goods with a felonious intention in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy.' This definition, which has been cited with approval in the Privy Council, was made with particular reference to the law of England, and it must be carefully noticed that the municipal policy of a particular state may treat as piratical acts (*e.g.*, the slave trade) which do not bear that complexion by the law of nations. Piracy in international law has been defined as the offence of depredating on the seas<sup>1</sup> without being authorised by any responsible state, or with commissions from different sovereigns at war with each other.<sup>2</sup> But both this definition and that of Sir Charles Hedges<sup>3</sup> are too narrow, in that they imply that an *animus furandi* is essential; whereas the essential characteristic of piracy is that the acts complained of are done without the authority of a sovereign state or a politically organised society, and for private ends, and 'robbery' or 'depredation' is not necessarily an ingredient of the offence. As Sir L. Jenkins has it<sup>3</sup>: 'The law distinguishes between a pirate who is a highwayman and sets up for robbing, either having no commission at all or else hath two or three, and a lawful man of war that exceeds his commission.' The definition given above makes it impossible to treat as pirates the bearers of letters of marque. A tendency has been shown from time to time to extend the definition so as to comprehend such persons, but however objectionable the practice of issuing privateer commissions to foreigners may be, the bearers are clearly not pirates, insomuch as they have behind them a politically organised and responsible society.

14. The doctrine above set forth was much discussed in the case of the *Huascar*. In 1877, in the course of a revolution at Peru, the crew of the *Huascar* seized the vessel and committed acts of violence on some British steamers. The

<sup>1</sup> Bynkershoek adds 'or land' (*Quæst. Jur. Pub. lib. i. c. xvii.*). The extension is reasonable when the acts are performed by persons descending on the land from the sea.

<sup>2</sup> Boyd's Wheaton, third English edition, p. 193.

<sup>3</sup> *Works*, vol. ii. p. 714, cited Wheaton.

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Peruvian Government by decree repudiated all responsibility for the acts of the ship. Under these circumstances the British commander in the Pacific, regarding the acts of the *Huascar* as piratical, engaged her in an indecisive encounter. The Peruvian Government then made a demand for satisfaction on the untenable ground that the acts of the *Huascar* did not amount to piracy. Piratical in the vulgar sense they certainly were not, but they were most clearly so within the meaning of international law. So far from there being a responsible, there was not even a belligerent society behind the vessel. She stood completely alone.<sup>1</sup>

<sup>1</sup> *Parl. Papers*, Peru, No. 1, 1877.

## CHAPTER IV

### THE TREATY LAW OF NATIONS

1. TREATIES form the contract law of states, and it is in dealing with their enforcement and duration that international law most conspicuously fails.<sup>1</sup> In the absence of a supreme authority capable of developing a system of law and enforcing its decrees, all rules are of the nature of suggestions for the guidance of conduct: and while nations are so careful as they are at present to reserve their right of action on questions concerning their 'honour and vital interests' in all general submissions to arbitration, the rules applicable to treaties of the more important kind, which do not merely deal with points of detail, must remain largely in the region of 'pious aspirations.' The analogy between contracts between states and contracts between individuals is useful: but if the purpose is to state the law as it is, this analogy must not be pressed too far. At the outset, on the question of consent, there is a marked distinction to be drawn: for whereas municipal law will not hold valid a contract obtained by force, many of the most important treaties of the world are the result of the exercise of force, or the threat of it, upon a nation which has no alternative but surrender. To treat force, therefore, as invalidating a treaty would be to strike at the root of every treaty made at the conclusion of a war: but this, of course, does not apply when the force is exercised on the person of the negotiator of the treaty. A certain

<sup>1</sup> Thus Mr. Woolsey (5th ed. p. 170), who certainly does not underrate the influence of international law, observes: 'A combination to commit injustice, . . . for example, to conquer and appropriate an independent country, as Poland, is a crime which no formalities of treaty can sanction. This rule, it is true, is not one of much practical application to the concerns of nations, for, beforehand, most of the iniquities of nations are varnished over by some justifying plea, and the only tribunal in the case is the moral indignation of mankind, while after the crime has triumphed, mankind accepts the new order of things rather than have a state of perpetual war.'



Analogy with  
Municipal Law.

amount of fraud, again, may be permissible : a nation need not disclose the weak spots in its own armour. 'Some latitude must be allowed in negotiating treaties of peace to the right of misleading an adversary which is incident to war.'<sup>1</sup> The boundary of permissible deceit will not on all occasions be easy to draw ; but the use, for instance, of forged documents will clearly lie outside it. Further on the question of how long a treaty remains binding the analogy of the municipal law of contracts is, as we shall see, hardly a safe guide : though possibly the claim which states make to disregard a treaty if the circumstances have changed may be supported by reference to those cases in municipal law, such as bankruptcy and the disappearance of the subject-matter of the contract, in which provision is made for the release of the parties otherwise than by mutual consent ; and it must always be remembered that in municipal law the breach of a contract is condoned on payment of damages, and that the enforcement of specific performance is an exceptional measure applied only to contracts of a particular kind.

2. The right to make treaties is an inherent element of national independence, and is perhaps the most decisive test of the existence of sovereignty. Its absence, for instance, from the powers enjoyed by the Transvaal Republic under the Convention of London of 1884, was of far more importance in determining the international position of that republic than the presence or absence of the word 'suzerainty.' From the point of view of international law it is immaterial where the treaty-making power resides, and other nations are entitled only to demand from those with whom they contract a *de facto* ability to bind the society which they assume to represent. The power may be general, as when it is exercised by the ministry of foreign affairs or some national assembly : or it may be special, as when it is exercised for obviously limited purposes by a military officer, and it will be for the other party to the treaty to see that it contracts with a properly authorised agent. No very valuable classification of treaties can, from the nature of the case, be given, for such instruments range over the whole variety of international relations.<sup>2</sup> A broad distinction is drawn, however, and will be discussed

<sup>1</sup> Westlake, *International Law*, Part I. p. 279.

<sup>2</sup> See Hall, 6th ed. p. 353n.

later, between such as produce their effect once for all, and are then, so to speak, exhausted, *e.g.*, a treaty of cession, and such as purport to regulate the relations of the parties for a definite or indefinite period. The former are usually described as 'transitory' conventions. Treaties of guarantee form an important class requiring special mention. Such treaties are sometimes difficult to construe, especially when the guarantee is jointly made by several powers. Acts in themselves contrary to accepted principles of international law have sometimes been defended as having been done under a treaty of guarantee; but in judging the legal quality of such acts it must never be forgotten that a treaty between A and B can in no circumstances entitle either as against C to do acts which are not otherwise permissible. So far as C is concerned, the treaty is *res inter alios acta*: and in case of war say between A and C, B cannot plead the treaty as justifying breaches of neutrality.<sup>1</sup> Of a collective guarantee a well-known instance was the treaty by which the great powers in 1831 asserted the perpetual neutrality of Belgium. It has been much disputed whether, if the other parties to such a guarantee decline to intervene on occasion, a single signatory is released from his obligations. Lord Derby, in 1867, answered this question affirmatively in a controversy which arose as to the English obligations under the Treaty of Luxemburg: 'In the event of a violation of neutrality all the powers who have signed the treaty may be called upon for collective action. No one of these powers is liable to be called upon to act singly or separately. It is a case, so to speak, of limited liability.'<sup>2</sup> Mr. Hall<sup>3</sup> criticises this view on the ground that 'a guarantee is meaningless if it does no more than provide for common action under circumstances in which the guaranteeing powers would act together apart from treaty, or for a right of single action as a matter of policy.' It seems a sufficient answer to the objection that states may normally be expected to abide by their undertakings, and therefore a joint guarantee will ordinarily secure concerted action pursuant to its terms, though the circum-

<sup>1</sup> Cf. the question of the supply of troops by a neutral to a belligerent, which is dealt with later, p. 192.

<sup>2</sup> Hansard, third Ser. clxxxvii. 1922, cited by Hall.

<sup>3</sup> 6th ed. p. 338.



Treatise of  
Guarantee.

stances are no longer such that 'the guaranteeing powers would act together apart from treaty.' On principle Lord Derby's contention is unanswerable. If a state undertakes a duty in concert with others, on what principle is it committed to an isolated performance? It was never pledged to such action, and its unassisted resources may fall far short of the occasion.

Forms and  
Ratification.

3. No form has been prescribed as essential to the validity of treaties, though, for reasons which need not be set forth, it is the practice to embody them in formal instruments. They are usually signed by plenipotentiaries of the powers interested, but are in no case binding until they have been ratified. The rule was settled in this form as early as Bynkershoek,<sup>1</sup> with the single exception that in his view ratification was unnecessary when the patent of authority contained full and detailed instructions. Later authorities recognise no exception at all to the rule. It is less easy to say under what circumstances ratification may properly be refused by the powers represented. Wheaton<sup>2</sup> recognises the following cases :—

- i. Where the representative has exceeded or deviated from his instructions.
- ii. Where events occurring between signature and ratification have made it impossible to fulfil the treaty stipulations.
- iii. Where the parties have been labouring under a mutual error, which error is discovered before ratification.
- iv. Where the circumstances have changed upon which the treaty in terms is made to depend.

The later view seems to be even more indulgent. In many countries the treaty-making body of the state is distinct from the executive ; treaties may often necessitate legislative changes in the municipal law of the contracting parties ;<sup>3</sup> and in such cases the fullest right of withholding ratification exists. It may be doubted whether the tendency is not drifting towards the recognition of an absolute right of

<sup>1</sup> *Quest. Jur. Pub.*, lib. ii. c. vii.

<sup>2</sup> 3rd English edit., p. 364.

<sup>3</sup> *Cf.*, for instance, Convention XII. of the Hague Conference of 1907 relative to the establishment of an International Prize Court (Miscell., No. 6, 1908, p. 101).



refusing to ratify. The view of Grotius,<sup>1</sup> which has reappeared so often in the pages of his successors, was coloured by the misleading analogy of agency in municipal law. It follows from the immensity of the interests involved, and the infinitely complex personality of the parties, that the negotiations between plenipotentiaries are more nearly akin to the *pourparlers* of a contract than to its formation.

Ratification.

4. The text-books contain minute rules of construction for the interpretation of ambiguous passages.<sup>2</sup> The value and authority of such statements is inconsiderable. Treaties are to be interpreted like other documents upon broad principles of common-sense, and refined rules of construction are of little importance when no authoritative tribunal can enforce them. The common-sense view was well stated by Erle, C.J., in an English case:<sup>3</sup> 'We are to construe this treaty as we would construe any other instrument public or private. We are to collect from the nature of the subject, from the words, and from the context, the true intent and meaning of the contracting parties whether they are A and B, or happen to be two independent states.'

Interpretation of Treaties.

5. As soon as ratification of a treaty has taken place, its obligatory effect is carried retrospectively to the time of signature. As Mr. Justice Davis in an American decision<sup>4</sup> expressed it: 'It is undoubtedly true, as a principle of international law, that as respects the rights of either Government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect confirming the treaty from its date.' But it does not follow that this principle is to be so applied as to invalidate private rights which have accrued in the period between the signature and the ratification. Private individuals are not bound to assume that the ratifying authority will ratify.

Commencement and Termination of Treaty Obligations.

6. Greater difficulties present themselves in determining the period when treaty obligations cease to bind, and it is somewhat unfortunate that the most authoritative statement on

<sup>1</sup> *De Jur. Bel. ac. Pac.*, lib. ii. c. 15.

<sup>2</sup> See Hall, 6th ed., p. 327 *et seq.*

<sup>3</sup> *Marryat v. Wilson*, 1 Bos. and Pull. at p. 439.

<sup>4</sup> *Haver v. Yaker*, 9 Wallace, at p. 34; and *cf.* Westlake, *International Law*, Part I. p. 281.

Termination of  
Treaties.

this point cannot be confidently accepted. The following proposition was affirmed by the Declaration of London in 1870 :—‘The plenipotentiaries of North Germany, of Austria-Hungary, of Great Britain, of Russia, and of Turkey, assembled to-day’ in conference, recognise that it is an essential principle of the law of nations that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers, by means of an amicable arrangement.’ But at the moment of this declaration the powers concerned were engaged in acquiescing in a flagrant violation of the principle enunciated : for Russia, forbidden by the Treaty of Paris of 1856 to maintain a fleet in the Black Sea, had seized upon the opportunity afforded by the Franco-German war to declare herself released from the restriction so imposed, without consulting any of the other parties to the treaty. It was not politically expedient at the time to resist by force the Russian claim : and the declaration above quoted was an effort to restore the somewhat damaged authority of the general principle of the binding effect of treaties. That it was not a very successful effort was shown by the events of the autumn of 1908. Austria was a party to the Declaration of London. By the Treaty of Berlin of 1878, Bosnia and Herzegovina while remaining under the suzerainty of the Sultan of Turkey, were placed under Austrian occupation and control. In 1908, Russia was exhausted by her war with Japan and by internal troubles, and Turkey had but recently come through the revolution which deposed Abdul Hamid and placed the Young Turks in a position of somewhat precarious power. Bulgaria having seized the line of the Oriental Railway Company, proclaimed her independence from Turkey on October 5, and Austria, two days later, with only one day’s warning to France and England, converted her occupation of Bosnia and Herzegovina into annexation, on the plea that those countries wished for constitutional institutions, and that the grant of such could more conveniently be made if the anomaly of Turkish suzerainty were removed. Turkey was indignant and boycotted Austrian goods. Servia and Montenegro fearing absorption in their turn, clamoured for war, while the

<sup>1</sup> November 22, 1870.



signatory powers of the Treaty of Berlin insisted upon a Conference, and did their best to restrain the Servian indignation. In January of the following year (1909), however, Turkey accepted £2,200,000 in compensation. Russia, acting, it is with good reason believed, under the influence of Germany, shortly afterwards recognised the annexation, and Great Britain persuaded Servia to give way. A Conference was no longer necessary, and the powers agreed to amend the treaty and legalise the action of Austria. That the treaty had been set at naught there can be little question: but as the two provinces were already practically in Austrian hands, the actual change effected was of little moment; and the case, though undoubtedly serious from the point of view of international law, was hardly so serious as the case of Russia and the Black Sea in 1870.<sup>1</sup> Both in theory and in view of subsequent events, it may be gravely doubted whether a standard so inelastic as that set up by the Declaration of 1870, does not involve an impossible strain on the respect conceded to international law. No temporal limits of any kind are assigned by the declaration to the duration of treaty obligations, and the refusal of one party to release another may in theory perpetuate an obligation which had its origin in wholly different conditions. Wheaton<sup>2</sup> treats the Declaration as elementary, and observes: 'It is melancholy to think that the most civilised powers of the world should have considered it necessary to put forward such a Declaration in the year 1871.' This view seems to rest on a confusion between the moral and legal aspects of the case. Carefully observing this distinction we may lay down the following propositions:—

1. No independent Government can indefinitely and for all time bind its successors by treaty, for the community so shackled would no longer be completely independent. It should follow therefore that every state becomes legally entitled to repudiate a treaty of indefinite obligation as soon as the conditions

<sup>1</sup> See *Annual Register*, 1908, p. 309 *et seq.*; 1909, p. 314 *et seq.*

<sup>2</sup> Third English edition, p. 106.



Termination of  
Treaties.

which preceded its formation have undergone substantial modification.<sup>1</sup>

2. If the obligation is temporary and definite, or if the circumstances under which it was made are not materially changed, the breach of it is legally wrongful.

It is difficult, however, to avoid the conclusion that in the present state of opinion, and unless the influence of the Hague Tribunal fosters the spirit of respect for law more rapidly than can reasonably be hoped, the validity of a treaty depends to an unfortunately large extent upon the power at the moment of the parties to it, and the political importance of the interests which may induce the one party to violate, and the other to insist upon the maintenance of, its terms.

Effect of War  
upon Treaty  
Obligations.

7. On the question of the effect of war upon treaty obligations it is impossible to lay down any general rule. If it is said that the outbreak of war abrogates or suspends all treaties between the parties, so many obvious and so many possible exceptions at once appear that the rule seems hardly worth enunciating, even as a starting-point for discussion. Clearly those treaties must remain in force which were concluded expressly with a view to war: such as the rules of the Hague Conventions for the regulation of belligerent action, or the convention between Great Britain and France as to postal service in time of war. 'Transitory conventions' too (*i.e.*, treaties which produce their consequences once for all, as opposed to treaties which impose continuing obligations) are often described as 'perpetual,' or unaffected by supervening incidents, including war.<sup>2</sup> A belligerent entering a territory ceded in the past to his adversary, clearly enters as

<sup>1</sup> It is no objection to this view that the other contracting party is entitled to go to war to enforce his treaty right. It is a conspicuous weakness of international law that A may be entitled in law to declare war against B for acts which B is entitled in law to do. For instance, if a given community is forcibly annexed, it is clearly, and at any time, entitled to attempt to reconquer its independence. The power annexing is equally entitled to make good its annexation by force.

The rule in the text may be, as Mr. Hall objects, dangerously lax, but it is believed to correspond with the facts of national practice. At least it avoids the *reductio ad absurdum* to which the Declaration of London leads. If that Declaration is well-founded, why are treaties of indefinite duration so often confirmed and renewed?

<sup>2</sup> Wheaton, El., Part. III. c. ii. §§9, 10.

a military occupant and not as a sovereign; the United States if at war with Great Britain would not be thrown back to the position of revolutionaries which they occupied before the recognition of their independence in 1783. And it is not only treaties of cession and the like which have this characteristic of permanence. States may make conventions as to the private rights of their respective subjects, as when the United States and Great Britain in 1794 gave to each other's subjects the right to hold and transmit land; where the rights were held not to have been interrupted by war, though the treaty was not expressly revived on the conclusion of peace in 1815. As Leach, M.R., said in *Sutton v. Sutton*,<sup>1</sup> 'The relations which had subsisted between Great Britain and America, when they formed one empire, led to the introduction of the ninth section of the treaty of 1794, and, the privileges of natives being reciprocally given not only to the actual possessors of lands but to their heirs and assigns, it is a reasonable construction that it was the intention of the treaty that the operation of the treaty should . . . not depend upon the continuance of a state of peace.' It may sometimes be a nice question whether a treaty is 'transitory' or not; and there may be instanced the dispute between Great Britain and the United States on the question of the Newfoundland fisheries at the beginning of last century. Great Britain in 1783 had allowed to the inhabitants of the United States the right of fishing in British territorial waters in Newfoundland and Canada. At the peace in 1815 the right was not expressly revived. Great Britain contended that it rested solely on convention, and on convention of a kind which was abrogated by war: the United States not only claimed that it was an integral part of the partition of the territory, but even, apparently, that quite apart from convention, the right belonged to the inhabitants of the United States, because they had previously enjoyed it while British subjects. The American claim was abandoned in the treaty of 1818, and the fishing rights granted by that treaty were recognised to depend upon contract.<sup>2</sup> The subsequent history of

Effect of War on  
Treaties.

<sup>1</sup> 1 Russ & Mylne, 675; and *cf.* for a similar American decision, *Society for the Propagation of the Gospel, v. Town of Newhaven*, 8 Wheaton, 464, Scott 428; *cf.* also Westlake, *International Law*, Part II. p. 30.

<sup>2</sup> Hall, 6th ed. p. 94; Westlake, *International Law*, Part II. p. 30.

**Effect of War on Treaties.** the question will be referred to later in the Chapter on Arbitration.

Again, treaties affecting the rights of third parties, or to which other powers than the belligerents are parties, cannot be said to be abrogated, or even suspended by war, except in so far as the war causes, for the time being, difficulties or impossibility of performance. In such case the principle seems clear, and it does not matter whether the treaty is of a 'transitory' nature or otherwise.

But on the whole question it is impossible to lay down rules of any but the most general kind and international practice has varied very much. After the Crimean War, fresh treaties of commerce were concluded; after the Franco-German War some treaties were revived and others were left unmentioned; and after the Russo-Japanese War no treaties were confirmed or revived at all.<sup>1</sup>

<sup>1</sup> Hall, 6th ed. p. 380.



## PART III

### BELLIGERENCY, OR THE RIGHTS AND DUTIES OF STATES IN TIME OF WAR

#### CHAPTER I

##### PREBELLIGERENT ACTS, COMMENCEMENT OF WAR AND ITS EFFECTS

1. THE arbitrament of war is final in the disputes of nations, Retorsions and the points previously in issue *transeunt in rem judicatam*.<sup>1</sup> and Reprisals. War may be defined as 'the state or condition of Governments contending by force,'<sup>2</sup> and in ascertaining whether such a state or condition exists, the intention of the parties or either of them must be looked at. The mere commission of certain acts of force, hostility or unfriendliness is not sufficient. There are, for instance, certain acts warlike in their essence but traditionally held to fall short of war, to which a nation may resort when provoked under circumstances of too little moment to call for a declaration of war. It is always open to the power affected by such acts to treat their commission as an act of war; if it does not elect to do so, the peace is deemed to remain unbroken. The most familiar among them are retorsions, reprisals, and pacific blockades. Retorsion is the return in kind of acts which fall short of hostility but are marked by unfriendliness. Thus differentiation of tariff may be met by acts of retorsion on the part of the state injuriously affected. Reprisals form the appropriate reply to particular acts of wrong, which the injured party is determined to resist unless satisfaction is given. In a passage<sup>3</sup> which has been

<sup>1</sup> Are merged in the decision.

<sup>2</sup> Westlake, *International Law*, Part II. p. 1.

<sup>3</sup> *Droit des gens*, liv. ii. § 342.

Retorsions and  
Reprisals.

often quoted, Vattel says: 'Reprisals are resorted to between two states to procure justice for themselves where it is not otherwise obtainable. If a nation has seized what belongs to another, if it refuses to pay a debt, to repair injury, or make proper satisfaction therefor, the state injured may seize something belonging to the other and use it for its own advantage till it has obtained the amount of its damage with interest, or it may retain it as a pledge until the wrongdoer has rendered full satisfaction. The property so seized is kept as long as the hope of obtaining satisfaction remains: when it disappears confiscation ensues and reprisals have accomplished their object.' Embargo or sequestration is a familiar application of the above principle. A good illustration of this was the action of Great Britain in 1839, when she captured and laid an embargo upon Sicilian vessels, because the two Sicilies had granted a sulphur monopoly in violation of a commercial treaty; the Sicilian Government retaliating by a counter embargo. Of a somewhat similar nature (though approximating rather to pacific blockade) was the Don Pacifico incident in 1849, still remembered as the occasion of Lord Palmerston's famous *Civis Romanus sum* speech. Don Pacifico, by birth in Gibraltar, had acquired British nationality: during his residence in Athens, his house was plundered by a mob with the countenance, it appeared, of some Greek soldiers. He claimed over £21,000, and the British Government, declining the jurisdiction of the native tribunals, demanded compensation. Meeting with a refusal, they instructed the British fleet to sequester all Greek ships in Greek ports. The commissioners to whom the claim was finally referred reduced the claim to £150.<sup>1</sup> Reprisals may be defended on the ground that they form a convenient mode of procuring redress without necessarily involving war. The real character of such acts depends upon the conduct of the state at which they are directed. If it is induced to give the required satisfaction the reprisal ceases; if it refuses, 'the retroactive effect . . . impresses the direct hostile character upon the original seizure; . . . it is no longer an equivocal act.'<sup>2</sup>

Pacific  
Blockades.

2. The character of pacific blockades has often been confusedly stated, and practice has not always been con-

<sup>1</sup> *Parl. Papers*, 1851, Wheaton, third English ed., p. 403.

<sup>2</sup> Per Lord Stowell in the *Boedes Lust*, 5 C. Rob. at p. 246.



sistent. The name itself is somewhat misleading. As <sup>Pacific</sup> between the powers at issue such a blockade involves, as <sup>Blockades.</sup> some forms of reprisal do, acts of constraint essentially non-pacific: but the view is now generally accepted that third powers may enter and leave the blockaded ports at pleasure. A state of war would be inconsistent with such a liberty, and from this point of view the blockade may be called pacific. In the earlier instances of such blockade, it is true, the ships of third powers were sometimes confiscated (*e.g.*, by France when blockading Mexican ports in 1838<sup>1</sup>), and sequestration without ultimate confiscation was frequent. In 1884 France blockaded Formosa and claimed to be entitled to capture and condemn the vessels of third powers while at the same time using Hong-Kong as a coaling station. This led to a declaration from Great Britain that 'the contention that a pacific blockade confers on the blockading power the right to capture and condemn the ships of third nations for a breach of such a blockade is in conflict with well-established principles of international law.'<sup>2</sup> In principle this declaration was unanswerable: unless it was directed against sequestration as well as condemnation, in which case it was hardly supported by international practice. Great Britain followed it up by treating the situation as a state of war, and forbidding the coaling of French vessels at British ports. The blockade of Venezuela by Great Britain and Germany in 1902 was of an ambiguous character. Great Britain instructed her fleet to seize and hand over to a prize court vessels of other nations than Venezuela, and in a proclamation at Trinidad a state of war was recognised. The German fleet actually bombarded Venezuelan ports. In the final settlement between Great Britain and Venezuela it was recognised that it might reasonably be contended that there was a state of war; but neither of the blockading powers in fact confiscated any vessels either belonging to Venezuela or any other power.<sup>3</sup> 'Pacific' is also a word of doubtful application to the blockade of Crete by the European powers in 1897, for there, too, the blockading forces fired on the inhabitants.

3. The legality of this form of blockade has been repeatedly

<sup>1</sup> Westlake, *International Law*, Part II. p. 12.

<sup>2</sup> *Parl. Papers*, France, No. 1, 1885; Westlake, *International Law*, Part II. p. 14.

<sup>3</sup> Westlake, *International Law*, Part II. p. 15.



Pacific  
Blockades.

questioned, and we may refer to the frank admission by Lord Palmerston in 1846.<sup>1</sup> 'The real truth is, though we had better keep the fact to ourselves, that the French and English blockade of the Plata has been from first to last illegal. Peel and Aberdeen have always declared that we have not been at war with Rosas: but blockade is a belligerent right, and unless you are at war with a state, you have no right to prevent ships of other states from communicating with the ports of that state, nay, you cannot prevent your own merchants' ships from doing so.' Whether Palmerston was right as to the control of the executive over merchant vessels in its relation to foreign powers is not so clear as he appears to have imagined:<sup>2</sup> nor is it by any means certain that the right to interfere with the vessels of third parties will never again be asserted. But such a right cannot be defended on principle, whatever justification it may receive from precedent, and, indeed, the whole institution of pacific blockade is an anomaly and its main, if not only, justification is that it has often been effective in securing its object without bloodshed.

Commencement  
of War.

4. For a considerable time it was thought in theory to be necessary that the outbreak of war should be preceded by a solemn declaration. This theory, probably a survival of the mediæval custom, was very frequently disregarded in practice, there being either no declaration at all, or a declaration at some date, sooner or later, after the first act of hostility.<sup>3</sup> There were, however, formal declarations before the Franco-German war in 1870, the Russo-Turkish war in 1877, and the Boer war in 1899: and Russia in 1904 complained because the formal declaration from Japan came two days later than the first attack. There has been, therefore, a growing tendency of late to respect the old theory. It must be remembered, of course, that the occurrence of a state of war imposes serious duties upon neutrals. Belligerents are vitally concerned in the discharge of these duties; and responsibility for their exercise can only arise after due notification to neutral powers that a state of war exists. In order to give such notice, states declaring war usually publish within their own

<sup>1</sup> Quoted in Hall, 6th ed. p. 367.

<sup>2</sup> See Westlake, *International Law*, Part II. p. 13.

<sup>3</sup> Hall, 6th ed. pp. 373-8; Pearce Higgins, *The Hague Peace Conferences*, p. 202.

territory and send to neutrals a manifesto, giving notice of the outbreak of hostilities. But such a proceeding cannot be taken as an admission of any obligation to warn the enemy of the coming attack.

5. At the Hague Peace Conference in 1907 a Convention<sup>1</sup> was drawn up, the preamble of which recited the importance of the principle that hostilities should not commence without previous warning, and that neutrals should without delay be notified of the existence of a state of war; and the contracting powers recognised 'that hostilities between them must not commence without a previous and explicit warning in the form of either a declaration of war, giving reasons, or an ultimatum with a conditional declaration of war:'<sup>2</sup> and that 'the existence of a state of war must be notified to the neutral powers without delay, and shall not be held to affect them until after the receipt of a notification, which may, however, be given by telegraph.'<sup>3</sup> The absence or non-receipt of such notification, however, is not to be taken as a justification of breaches of neutrality committed with knowledge in fact of the existence of a state of war.<sup>4</sup> Surprise attacks are still possible; for it was not found practicable to lay down any rule requiring the lapse of even the shortest time between the notification and the first act of hostility; though it may probably be taken that an attack without previous negotiations or any apparent ground of quarrel will be always regarded as an outrage.<sup>5</sup> This Convention (No. III. of 1907) was ratified on behalf of Great Britain in November 1909.

6. The commencement of war produces immediate results of far-reaching consequence to the citizens of the states involved. The right to recover debts from, and the liability to be sued by, enemy subjects are suspended during the war<sup>6</sup> (but revive on the conclusion of peace<sup>7</sup>), and partnerships with them are immediately dissolved. New contracts are forbidden<sup>8</sup> and, speaking generally, intercourse between the individuals of belligerent states is only permitted under

Persons  
affected by  
War.

<sup>1</sup> No. III. of 1907.

<sup>2</sup> Art. 1.

<sup>3</sup> Art. 2.

<sup>4</sup> Art. 2.

<sup>5</sup> Pearce Higgins, p. 203; Westlake, *International Law*, Part II. p. 23.

<sup>6</sup> At the Hague, in 1907, an Article was adopted which appears to change the law in this respect, but its meaning is very doubtful (see p. 130, *infra*).

<sup>7</sup> *Ex parte Boussmaker* 13 Ves. 71, Scott, 494.

<sup>8</sup> The Hoop, 1 C. Rob., 196, Scott, 521; *ex parte Boussmaker*, *supra*.



Persons Affected by War. exceptional circumstances. This practice flows logically from the view that the subjects of an enemy state are themselves

enemies, a view which found its extreme expression in the ancient formula, 'courir sus aux ennemis,' which was an instruction to all loyal subjects to kill, capture and pillage all subjects of the enemy state. Certain theorists have committed themselves to the doctrine that the non-combatant individuals of belligerent communities are not affected by enemy character. Thus Rousseau, in a well-known passage, said :<sup>1</sup> 'La guerre n'est point une relation d'homme à homme, mais une relation d'état à état . . . chaque état ne peut avoir pour ennemis que d'autres états, et non pas des hommes, attendu qu'entre choses de diverses natures on ne peut fixer aucun vrai rapport.'

It is sufficient to say of this view that it has little correspondence with the actual practice of nations. If it were well founded, acts done without question in almost every war, against both the persons and properties of civilians, would be illegal. The English view hereon was stated clearly enough by Willes, J., in *Esposito v. Bowden* :<sup>2</sup>—

'It is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal.'

7. The practice of 'crippling the enemy's commerce' by capturing private property on the sea is generally admitted to be permitted by the existing law of nations (though whether it ought to be permitted is a matter of controversy<sup>3</sup>), and is inconsistent with the doctrine which so many publicists have borrowed from Rousseau. The commencement of war, then, puts an end to non-hostile intercourse between subjects of the belligerent parties. It is, however, from the nature of the case impossible to carry this doctrine to an extreme conclusion, and the convenience of belligerents has provided conditions under which such intercourse becomes permissible. By giving a passport, a belligerent Government authorises an

<sup>1</sup> *Contrat social*, liv. 1, ch. iv.

<sup>2</sup> 7 E. and B. at p. 779.

<sup>3</sup> See p. 165, *infra*.



enemy subject to travel generally in his territories. A safe-conduct is a licence, similarly given, to travel to a particular place for a particular purpose. A licence to trade is a permission by a belligerent state to its own subjects, or to enemy subjects, or both, to carry on a mutual trade notwithstanding the war in which they are engaged. Such licences are of course only effective in the courts of the issuing power, and cannot in any way affect the other belligerent. It is strictly necessary that they should emanate from the sovereign power, and, if they are issued by subordinates, the authority will be jealously scrutinised and will in no case be presumed.<sup>1</sup> The general principle involved in the concession of licences to trade was well laid down by Lord Ellenborough in *Usparicha v. Noble*:<sup>2</sup>—

‘The legal result of the licence granted in this case is, that not only the plaintiff, the person licensed, may sue in respect of such licensed commerce in our courts of law, but that the commerce itself is to be regarded as legalised for all purposes of its due and effectual prosecution. To hold otherwise would be to maintain a proposition repugnant to national good faith and the honour of the Crown. The Crown may exempt any persons and any branch of commerce, in its discretion, from the disabilities and forfeitures arising out of a state of war; and its licence for such purpose ought to receive the most liberal construction. . . . For the purpose of this licensed act of trading (but to that extent only) the person licensed is to be regarded as virtually an adopted subject of the Crown of Great Britain; his trading, as far as the disabilities arising out of a state of war are concerned, is British trading.’

Any misdescription or misrepresentation in procuring the licence will invalidate it,<sup>3</sup> and there must be no unnecessary deviation from the course permitted.<sup>4</sup>

8. The rule as to the suspension of contractual relations during a war does not enable a state to repudiate its obligations to enemy subjects in respect of state debts. The action of Frederick the Great in 1753 in withholding payment of the interest upon the Silesian loan is not strictly in point. It was a case of reprisals by a neutral for captures of ships, the validity of which he disputed: but opinions on the

<sup>1</sup> *The Hope*, 1 Dods. Ad. 226.

<sup>2</sup> 13 East 332, at p. 340.

H

<sup>3</sup> *Klingender v. Bond*, 14 East, 484.

<sup>4</sup> *The Emma*, Edwards, 366.

State Debts.

operation were so unanimously adverse that the inviolability of the claim of a state's debtor has been treated ever since as beyond dispute. Indeed any state which was suspected of being likely to question it would suffer heavily in the rate of interest it would have to pay.

Enemy Persons  
in a State at the  
Commence-  
ment of  
Hostilities.

9. Mediæval statesmen showed no indulgence to resident enemies, and Grotius<sup>1</sup> fully admitted that such persons might be treated as prisoners while the war lasted. He adds, however, that they ought to be released as soon as hostilities come to an end.<sup>2</sup> For many centuries a common stipulation in commercial treaties provided that the subjects of the contracting powers should have liberty to withdraw from each other's territories on the outbreak of war. Modern usage entitles us to lay down a positive rule, that such persons, independently of treaty, must be allowed a reasonable period within which to withdraw. The correct principle was long ago stated by Vattel:<sup>3</sup> The sovereign who declares war cannot detain those subjects of the enemy who are within his dominions; he must allow a reasonable period for withdrawal, on the ground that his permission to enter the territory tacitly involved a promise to afford protection and liberty to return. In this country *Magna Charta*, with admirable prudence, provided that enemy merchants found in England on the outbreak of war should be arrested without injury to person or property, until it was ascertained how English merchants were treated by the enemy. The conduct of France in arresting all British subjects in that country, on the outbreak of war in 1803, has been universally condemned, and it is significant that even Napoleon attempted to justify the step as a retaliation, thus tacitly admitting its illegality under ordinary conditions. His action appears the more outrageous when it is remembered that in 1756 England had given the singular permission to French subjects to continue their residence in this country, on the condition of good behaviour during the war between the two countries. A similar tolerance has been so often stipulated for in treaties, that expulsion is now considered a vexatious exercise of strict belligerent rights, unless the circumstances are in some

<sup>1</sup> *De Jure Belli et Pacis*, III. ix. 4.

<sup>2</sup> In his day, ordinary prisoners were not released as a matter of course.

<sup>3</sup> *Droit des gens*, liv. III. ch. iv. § 63.



way exceptional. Permission to remain involves permission to hold property and to carry on trade, so long as such trade is not with enemy subjects abroad; and the immunity of the private property of persons so remaining may now be taken to be extended to the private property of all enemy subjects whether they are in the country or not. Such immunity is in many cases secured by treaty; it was recognised by the British Courts so early as 1817<sup>1</sup> though there are British and American decisions to the contrary: and it is a legitimate deduction from the modern principle of the immunity of private property on land which we shall see illustrated in relation to the laws of war. On the outbreak of the Crimean War, Russian merchants were not required to withdraw from England nor English from Russia. In 1870 Prussians resident in France were allowed to stay during good behaviour and *vice versa*. The permission to Prussians was afterwards cancelled under circumstances of exceptional difficulty, so far as the department of the Seine was concerned. At the outbreak of the present Transvaal War almost all British subjects were expelled by the authorities of the South African Republic. It is probable that numerical considerations of an exceptional character justified the expulsion in this case. A case in which arrest and detention might perhaps be justified is that in which foreign subjects on returning to their own country will be liable to military service; for it is not reasonable to expect a state to allow a substantial portion of the enemy's army to join the colours.

Enemy Persons  
in a State at  
Commencement  
of Hostilities.

10. The question of merchant vessels found at the outbreak of hostilities in enemy ports has received special treatment. It was the old custom to place an embargo upon these before war broke out, thereby condemning them as good prize in advance, under the name of 'droits of admiralty.'<sup>2</sup> With the progress of more humane ideas, time was allowed for their departure, and at the Hague Conference in 1907, the modern practice was embodied in a Convention<sup>3</sup> which, however, imposed no obligation to grant days of grace, and did not specify the time which should be allowed. It was agreed

Enemy Merchant  
Vessels.

<sup>1</sup> Wolff v. Oxholm, 6 M. and S. 92; and cf. Westlake, *International Law*, Part II. p. 43.

<sup>2</sup> Hall, 6th ed. p. 369; Pearce Higgins, p. 300; Westlake, *International Law*, Part II. p. 39.

<sup>3</sup> No. VI. of 1907.



Enemy Merchant Vessels.

that 'when a merchant ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port, *it is desirable* that it should be allowed to depart freely either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination, or any other port indicated to it. The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out.'<sup>1</sup> This was merely a recognition of the existing practice: it was a step in advance to declare that vessels and cargo unable to leave within the time allowed should not be confiscated but merely detained during the war, or requisitioned on payment of compensation.<sup>2</sup> The principle of exemption was extended to vessels which left their last port of departure before the commencement of the war and are encountered on the high seas while ignorant of the outbreak of hostilities;<sup>3</sup> these, too, are only to be detained, and if they are requisitioned or destroyed compensation must be paid and provision must be made for the safety of persons and papers on board. The same exemption was applied to enemy cargo on such ships.<sup>4</sup> But Germany and Russia declined to agree to these last Articles (*i.e.* 3 and 4), considering that they imposed too heavy a burden upon states which did not possess naval stations to which such vessels can conveniently be taken.<sup>5</sup> Finally, it was agreed that the Convention should not refer to ships 'whose construction indicates that they are destined to be transformed into war ships';<sup>6</sup> but as to what ships are of this character there are likely to arise several nice questions of fact: questions which, in view of the permissive character of the whole Convention are not likely to be definitely settled.

This Convention (No. VI. of 1907) was ratified on behalf of Great Britain in November 1909.

Revolutionary Hostilities.

II. On the outbreak of rebellion or of revolutionary disturbance in a foreign country, a difficult question often confronts neutral Governments. It becomes necessary to decide whether the hostilities are of such a character as to justify

<sup>1</sup> Art. 1.

<sup>2</sup> Art. 2.

<sup>3</sup> Art. 3.

<sup>4</sup> Art. 4.

<sup>5</sup> Pearce Higgins, p. 304.

<sup>6</sup> Art. 5.

them in conceding to the revolting faction the status of belligerents. Recognition of belligerency will naturally long precede recognition of independence, and its justification must depend upon quite different grounds. The right to treat insurgents as belligerent persons is based on the material interests of the neutral, which may be gravely compromised by equivocal disturbances. Following this principle as a guide, it becomes necessary to distinguish between cases when the civil hostilities are confined to land, and those when they extend to the sea. In the first case the neutral has little to gain by an early recognition of belligerency; in the second, such a recognition need not be delayed a moment after it has become clear that an organised struggle is in progress. Either there is a war in such a case or there is not; if there is, it may properly be recognised, if there is not, blockades, contraband restrictions, and the right of search are alike impermissible. It may therefore be laid down that as soon as an organised rebellion has reached such proportions as to involve demands upon neutrals which can only be supported upon the hypothesis that a state of war exists, the recognition of such a state becomes immediately legal.

Revolutionary  
Hostilities.

12. This question was much discussed on the outbreak of the American Civil War in April 1861. The belligerency of the Confederate States was recognised by Great Britain on the 14th of May, and the recognition was bitterly resented by the United States Government. It is not easy to understand the American contention in view of the fact that on April 19 a blockade of the seven states had been declared by President Lincoln, involving an essentially warlike interference with the rights of neutral commerce. In a series of prize decisions the true view was stated by the Supreme Court of the United States:<sup>1</sup>—

‘It is not the less a civil war with belligerent parties in hostile array, because it may be called an “insurrection” by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or state be acknowledged in order to constitute it a party belligerent in war, according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist,

<sup>1</sup> Prize causes, 2 Black 635.

Recognition of Belligerency. unless there be two belligerent parties. . . . As soon as the news of the attack on Fort Sumter, and the organisation of a Government by the seceding states, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May 1861, the Queen of England issued her proclamation of neutrality "recognising hostilities as existing between the Government of the United States of America and certain states styling themselves the Confederate States of America." This was immediately followed by similar declarations or silent acquiescence by other nations.'



## CHAPTER II

### COMBATANT PERSONS AND THE MODES OF VIOLENCE PERMISSIBLE TOWARDS THEM

1. FOUR important international documents provide a fairly complete code for the guidance of combatants in land warfare—the unratified Declaration of Brussels of 1874, the Second Convention of the Peace Conference of 1899, the Fourth Convention of the Peace Conference of 1907, and the Geneva Convention of 1906. The United States had led the way by drawing up a series of rules in 1863, which were adopted (except in so far as they dealt with the question of *levies en masse*) by Germany in 1870;<sup>1</sup> and the Conference of the powers at Brussels in 1874 drew up a Declaration in that year which was, however, never ratified, Great Britain and Germany in particular declining to accept it at the time, though it subsequently became the basis of the Conventions agreed upon at the Hague. But even in 1899 and 1907 there was no unanimity, chiefly owing to the difficulties arising on the question of the conditions under which combatants may be recognised and treated as belligerents, and the result was that the actual Regulations were set out as annexes to the Conventions, the contracting parties only agreeing to issue instructions to their forces in conformity with these Regulations, without expressly binding themselves to accept them in their entirety.<sup>2</sup> They are ‘general rules of conduct for belligerents in their relations with each other and with populations’; though it is to be noted that a certain binding force is recognised in them by the provision of the Convention of 1907 (which supersedes that of 1899<sup>3</sup>), that belligerent parties

<sup>1</sup> Pearce Higgins, *The Hague Peace Conferences*, p. 256; Hall, 6th ed. p. 512.

<sup>2</sup> Convention II. of 1899, Art. 1, and Convention IV. of 1907, Art. 1, *Parl. Papers*, Misc., No. 1 (1899), pp. 56-58. Convention IV. of 1907 was ratified on behalf of Great Britain in November 1909.

<sup>3</sup> Art. 4.

The Hague Conventions.

violating the Regulations shall make compensation 'if the case demands.' It must also be remembered that the mere absence of a specific prohibition is not to be taken as justifying any particular act or practice. In the preambles to both Conventions (1899 and 1907) it was laid down that 'it could not be intended by the High Contracting Parties that the cases not provided for should, for want of a written provision, be left to the arbitrary judgment of military commanders. Until a more complete code of the laws of war can be issued, the High Contracting Parties think it expedient to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience.' The Convention has been signed, with occasional reservations, by all the powers except China, Spain and Nicaragua.

2. The Swiss Government summoned a Conference at Geneva in 1864, which drew up a code of rules relating to the treatment of the wounded, and those in charge of them, in land warfare. A second Conference in 1868 drew up further rules by way of addition and explanation, and applying the principles of 1864 to naval warfare. These, though generally acted upon, were never ratified. A more complete code became desirable, and at the Hague in 1899 it was left to the Swiss Government to summon a further Conference, which met in 1906 and drew up the code (dealing with land warfare) of that year: and the same principles were adapted to naval warfare at the Hague in 1899 (Convention III.) and 1907 (Convention X.).

3. Both within and without the regular armed forces of the belligerents it is of great importance to determine the limits of combatant character. The Declaration of Brussels and the Hague Conventions lay it down that 'the armed forces of the belligerent parties may consist of combatants and non-combatants.' Combatants are entitled to some privileges: non-combatants to others: and a belligerent is entitled to require securities that enemy individuals shall not be able to pass at pleasure from one class to the other. Non-combatants within the armed forces include chaplains, the medical and



hospital staff<sup>1</sup> (including those exclusively engaged in the collection, transport and treatment of the wounded), the *personnel* of voluntary aid societies duly authorised and notified, all of whom are, by the Geneva Convention of 1906, not to be treated as prisoners of war, but are to be respected and protected in all circumstances, even though they are armed and use their arms in self-defence, or in defence of the sick and wounded. If captured by the enemy, they are to continue to carry on their duties under his direction (Art. 12), and to be sent home when their services are no longer indispensable, and they are (except in the case of voluntary aid societies) to be paid on the same basis as persons of the same rank employed by the enemy (Art. 13).

Other non-combatants with the army, such as commissariat employés, contractors, telegraphists and the like,<sup>2</sup> may be made prisoners of war if the enemy think fit to detain them, and have a right to be treated as such: and newspaper correspondents are included in this category, though they will probably only be detained for special reasons.<sup>3</sup>

4. Sailors, of whatever nationality, on board the enemy's merchant ships were till recently regarded as liable to capture as prisoners of war, on the ground of the assistance they might give in naval operations. The point was disputed by Germany in 1870 with no very good reason, but may now be regarded as settled by the Hague Convention (No. XI.) of 1907, by which it was agreed<sup>4</sup> that on the capture of an enemy merchant ship, which is taking no part in the hostilities, neutral sailors cannot be made prisoners, nor neutral officers if they promise in writing not to serve on an enemy ship during the war, the promise being only required from the officers; while enemy officers and crew are to enjoy the same exemption on giving a written undertaking not to engage, for the like period, in any service connected with the operations of the war, whether on land or sea. This Convention (No. XI. of 1907) was ratified on behalf of Great Britain in November 1909.

5. So far we have dealt with the right of non-combatants

<sup>1</sup> Geneva Convention, 1906, Arts. 6, 9, 10, 11 *et seq.*

<sup>2</sup> Hall, 6th ed., p. 400. Hague Convention, 1907 (No. IV.), Art. 13.

<sup>3</sup> Hall, 6th ed., p. 400*n*.

<sup>4</sup> Arts. 5, 6, 7 and 8 of Convention XI. of 1907.



Right to be  
treated as Prison-  
ers of War.

either to be treated as prisoners of war or be released. More difficult has been the settlement, if indeed it can be said to be yet settled, of the question of the right of combatants to be treated as prisoners of war, instead of being shot, or otherwise punished, as violators of the rules which must be observed by belligerents. The Hague Conventions of 1896 and 1907 repeated Article 9 of the Declaration of Brussels on this point:

*'The laws, rights and duties of war are applicable not merely to armies, but also to militia and volunteer corps satisfying the following conditions:—*

1. *That of having at their head a person responsible for those under him.*
2. *That of wearing an irremovable and characteristic badge of a kind to be recognised at a distance.*
3. *That of openly carrying arms.*
4. *That of conforming in their operations to the laws and customs of war.*<sup>1</sup>

6. The more exacting claim has been sometimes made that combatants shall wear a uniform distinguishable at rifle range. The question arose in the Franco-Prussian War, in connection with the *franc tireurs*, who took up arms on behalf of France. Germany refused to recognise them as combatants on the ground that they wore no badge irremovable and distinguishable at rifle range. The claim is reasonable that the badge shall be of such a kind that a man may not suddenly convert himself by its removal from a combatant to a peaceful farmer, but to demand a badge distinguishable at rifle range is, as Mr. Hall expresses it,<sup>2</sup> to require not merely a uniform but a conspicuous one. The tolerance at present conceded to guerilla troops is a bare one, and is less likely to be extended than curtailed. Thus a Prussian notice published at Vendresse in the Franco-Prussian War, declared that any person wearing plain clothes and fighting without Government authority would be liable to ten years' imprisonment, or, in an aggravated

<sup>1</sup> *Parl. Papers*, Misc., No. 1 (1899): 'Règlement concernant les Lois et Coutumes de la Guerre sur Terre, sect. i. ch. i. article 1. Misc., No. 6 (1908), p. 50.

<sup>2</sup> 6th ed., p. 516.

case, to execution. Section 4<sup>1</sup> of the American instructions Guerilla Warfare. contains the following provision upon this point:—

‘Men, or squads of men, who commit hostilities . . . without commission, without being part and portion of the organised hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.’

7. A somewhat similar class of question arises in the *Levies en masse* of an invaded populace. Both at the Brussels and Hague Conferences a conflict of opinion disclosed itself on this point between the larger and smaller continental powers. The former showed a disposition to exact a more stringent degree of conformity to the formalities of combatant character than the smaller powers held to be consistent with the desperate nature of the crisis. Article 10 of the Declaration of Brussels was finally adopted with one alteration at the Hague in 1899 and 1907:—

‘*The population of an unoccupied territory, which, on the approach of an enemy, takes up arms spontaneously to resist the invading force, without having had time to organise itself conformably to Article 1,<sup>2</sup> will be treated as belligerent, if it carries arms openly<sup>3</sup> and respects the laws and customs of war.*’

The British Delegate, in 1899, was anxious to move an additional Article to this effect: ‘Nothing in this chapter shall be considered as tending to diminish or suppress the right which belongs to the population of an invaded country to patriotically oppose the most energetic resistance to their invaders by every legitimate means.’<sup>4</sup> But M. de Martens substituted a somewhat vague pronouncement, which was received with acclamation, to the effect that ‘unforeseen cases were not to be left to the arbitrary judgment of military commanders, but were to be placed under the safeguard of

<sup>1</sup> Rule 82.

<sup>2</sup> Already quoted on p. 122.

<sup>3</sup> These words were added in 1907.

<sup>4</sup> *Parl. Papers*, Misc., No. 1 (1899), p. 161.



*Levies en masse.* the law of nations, the law of humanity, and the requirements of the public conscience.'

It is clear that in the case of *levies en masse* it is not reasonable to require either a uniform or an explicit state authorisation. As to the uniform, Wellington wrote to Massena in 1810, in reference to the Portuguese Ordenanza: 'Il parait que vous exigez que ceux qui jouiront des droits de la guerre soient revêtus d'un uniforme: mais vous devez vous souvenir que vous même avez augmenté la gloire de l'armée française en commandant des soldats que n'avaient pas d'uniforme.'<sup>1</sup> On the question of authorisation, the provisions of Article 1 of the Annexes to the Conventions of 1899 and 1907 must be considered as a disallowance of the German requisition made in 1871, that 'every prisoner, in order to be treated as a prisoner of war, shall prove that he is a French soldier, by showing that he has been called out and borne in the lists of a military organised corps, by an order emanating from the legal authority, and addressed to him personally.'

Privateers.

8. To turn for a moment to maritime hostilities, all authorised vessels belonging to the state are legitimate combatants. Privateers are vessels belonging to private individuals, but given a combatant licence by the Sovereign. The nature of the rights enjoyed by privateers over captured property was well stated by Marshall, C.J., in the *Dos Hermanos*:<sup>2</sup> 'It is the settled law by the United States that all captures made by non-commissioned captors are made for the Government; and since the provisions in the Prize Acts as to the distribution of prize proceeds are confined to public and private armed vessels cruising under a regular commission, the only claim which can be sustained by the captors in cases like the present must be in the nature of salvage for bringing in and preserving the property.' The law of privateering has become of secondary importance since the Declaration of Paris in 1856. Under the terms of that Declaration, privateering may no longer be practised by the signatory powers when at war with another. The United States, Spain, Mexico, Venezuela, Bolivia and Uruguay did not assent to the prohibition, the power first named basing its refusal on the convenience of privateers to a state without

<sup>1</sup> *Wellington Despatches*, vi. 464.

<sup>2</sup> 10 Wheaton at p. 310.



a powerful navy, as long as the right of capturing private Privateers. property on the seas survives: an amendment exempting private property from such capture having been rejected. It is noticeable, however, that in the Spanish American War both belligerents abstained from issuing letters of marque to privateers. The United States acted thus in accordance with a definitely proclaimed policy, Spain without prejudice to her right to issue letters of marque if she so desired.<sup>1</sup> However, at the Hague Conference in 1907, both Spain and Mexico proclaimed their adhesion to the Declaration of Paris,<sup>2</sup> so that privateering may be said to have been, in fact, abolished. Germany in 1870, and Russia in 1878, proposed to encourage 'volunteer navies,' which would have reintroduced, under a less offensive name, some of the characteristic evils of privateering. In the German case the vessels were to be under naval discipline and the officers and crew were to enter the navy temporarily, and wear its uniform: in the Russian case the vessels were to be under the command of naval officers and the crews subject to naval discipline. It is to be regretted that Great Britain, when appealed to by France on the earlier occasion, upheld a distinction between this system and privateering, subtle enough to annihilate, if generally adopted, and unless accompanied by careful restrictions, the beneficial results of the Declaration of Paris. The Russian scheme was in fact carried out by the formation of a 'volunteer navy,' with a Government subsidy and under the command of naval officers: and in 1904, during the Russo-Japanese War, two vessels of this fleet, the *Petersburg* and *Smolensk*, passed through the Bosphorus and Suez Canal as merchant vessels, and in breach of a specific undertaking given officially to Turkey, made captures as war vessels in the Red Sea.<sup>3</sup> The seizure of the *Malacca* of the Peninsular and Oriental Line, by the *Petersburg*, called forth a strong protest from Great Britain, which led to that vessel's immediate release, and an agreement by Russia to restore all vessels captured by the two alleged cruisers. Their passage through the Bosphorus was

<sup>1</sup> Holland, *Letters on War and Neutrality*, p. 122.

<sup>2</sup> *Parl. Papers*, Misc., No. 4 (1908), p. 48. *La Deuxième Conférence Internationale de la Paix*, t. i. (*Actes et Documents*), p. 234.

<sup>3</sup> Hall, 6th ed. p. 523 n.; Pearce Higgins, *The Hague Peace Conferences*, p. 314.

Volunteer  
Navies.

in itself a breach of the Treaties of Paris, London and Berlin, which was aggravated by their assumption of a false character: and the case, while raising the whole question of the permissibility of 'volunteer navies,' also raised the question of the conversion of merchant vessels into ships of war, which engaged the attention of the delegates to the Second Peace Conference of 1907 and the Conference of London in 1908.<sup>1</sup> The most important point of all—whether the conversion can take place on the high seas—was left, as we shall see, undecided: but that merchant vessels can be used as war vessels is generally admitted, and rules regulating such use were agreed upon at the Hague in 1907.<sup>2</sup> Great Britain, France and the United States<sup>3</sup> all have arrangements with mail-steamship companies, whereby the companies' vessels are at the disposal of the Government on the outbreak of war, and it is conceived that no doubt can arise, if such vessels are under complete Government control as units of the regular navy and are not employed for the purpose of private gain. The employment of the *Petersburg* and *Smolensk* may, so far as this aspect of the case is concerned, have been defensible, as they were the property of a patriotic association, presumably not intent upon private gain, were under the command of a duly commissioned officer, and were manned by crews under naval discipline: and it may have been Russia's misfortune rather than her fault that they did not operate with her regular fleet, and got so far out of hand that the services of British cruisers were called in in order to convey to them the order to desist.<sup>4</sup> But in all the circumstances, it is by no means clear that they were not privateers within the meaning of the Declaration of Paris.

Conversion of  
Merchant Ves-  
sels into War  
Vessels on the  
High Seas.

9. The chief question on which the Hague Conference of 1907 and after it the Naval Conference<sup>5</sup> at London found themselves unable to come to any agreement, was that of the conversion of merchant vessels into war vessels upon the high seas. It is of course an essential condition of the right

<sup>1</sup> See *infra*.

<sup>2</sup> See p. 127, *infra*.

<sup>3</sup> Pearce Higgins, *The Hague Peace Conferences*, p. 314.

<sup>4</sup> Smith and Sibley, *International Law as Interpreted during the Russo-Japanese War*, 2nd ed. p. 46.

<sup>5</sup> Full details of this Conference will be found later in the Chapters on Neutrality.



of any belligerent vessel to interfere in any way with any neutral, that it must be an authorised and properly commissioned public ship of war. If a state is able to send out what is to all appearances a merchant vessel, and to turn her into a warship during her voyage, a dangerous facility is given to her master to seize enemy or neutral ships without warning: and she will, while ostensibly a merchant vessel, enjoy the advantage of coaling, provisioning and taking refuge in neutral parts, which as a war ship she could not claim. In fact her position is analogous to that of a person who is not a recognised combatant in land war.

10. British case law throws no light upon this question and there has been no uniformity of national practice. A private vessel could, till privateering was abolished by the Declaration of Paris, lawfully seize enemy property: but might be treated as a pirate if she attacked the property of neutrals. The granting of commissions or letters of marque to private ships was an attempt to legalise the operations of such vessels which, in spite of protests, was generally recognised as effective: and the complete conversion of a private vessel into a war vessel could not in principle be made the subject of objection. The whole question was raised in an acute form in 1904 by the exploits of the *Petersburg* and *Smolensk*, to which reference has already been made: and the Second Peace Conference in 1907 dealt to some extent with the question in Convention VII.<sup>1</sup> in which it was agreed that a vessel so converted must be under the direct authority, immediate control and responsibility of the power to which it belongs,<sup>2</sup> must bear the external marks which distinguish a war ship of its nationality,<sup>3</sup> must be in command of a person in the state service, duly commissioned, and figuring in the list of officers of the fleet,<sup>4</sup> must be manned by a crew subject to military discipline<sup>5</sup> and must observe the laws and customs of war:<sup>6</sup> and that a belligerent must announce such conversion as soon as possible in the list of its war ships.<sup>7</sup> These regulations were framed to control the capricious exercise of the right of conversion, and they establish a sufficiently clear distinction between the vessel which complies with them and the privateer as generally

<sup>1</sup> Cd. 1175, p. 74.

<sup>2</sup> Art. 1.

<sup>3</sup> Art. 2.

<sup>4</sup> Art. 3.

<sup>5</sup> Art. 4.

<sup>6</sup> Art. 5.

<sup>7</sup> Art. 6.

Conversion of  
Merchant Vessels.



Conversion of  
Merchant Ves-  
sels.

understood; but it was found impossible to come to any agreement that a vessel may not be so converted on the high seas.

11. In the memoranda drawn up by the powers represented at the Conference of London,<sup>1</sup> the difference of opinion was marked. There was no material on which there could be framed any proposition based on recognised rules. The British Government could only rely on the general principle that 'any further limitation to the security of peaceful commerce or of the freedom of neutral vessels to navigate the seas is opposed to the general interests of nations, while the exercise of belligerent force against neutrals in the manner indicated . . . would almost inevitably lead to friction, with the attendant danger of bringing other nations into the arena of war:' and on this they urged 'that units of the fighting force of a belligerent should not be created except within the jurisdiction of that power.' In default of agreement on this, it was suggested that by way of compromise, the right of conversion on the high seas should be restricted to vessels specifically and publicly designated in advance as suitable for the purpose, and entered on the navy lists: and that such vessels should be subjected while in neutral ports to the same treatment as war ships. The United States, Japan, the Netherlands, and Spain supported the British contention; France and Russia claimed the unfettered right of conversion; Germany, while claiming the right, suggested as a restriction that there should be no reconversion during the war; Italy, while supporting the British view, tried to effect a compromise; and Austria-Hungary in an argumentative memorandum suggested that there should be some restrictions, the prohibition, for instance, of reconversion and the insistence upon a special armament and speed, and upon special notification. The discussion took much the same form in 1909 as in 1907; the claim to an unrestricted right was firmly maintained, and the question was of necessity left entirely open.

The Convention (No. VII. of 1907) was ratified on behalf of Great Britain in November 1909.

Limits of  
Permissible  
Violence.

12. Not every mode or instrument of violence is permitted by the laws of war. The general principle must always be

<sup>1</sup> Miscellaneous, No. 5 (1909), Cd. 4555, pp. 108-111.

observed that only such violence is permissible as is reasonably proportionate to the object to be attained, namely, the breaking down of the armed resistance of the enemy. The preamble of the Declaration of St. Petersburg in 1868 recognised 'that the only legitimate end which states should aim at in war is the weakening of the military forces of the enemy, and to this end it is sufficient to put out of action the largest possible number of men: and that this end would be exceeded by the use of arms, which would uselessly aggravate the sufferings of men put out of action, or would render their death inevitable.' The rules on this point, as at present agreed in principle, are set out in Articles 22 to 28 of the Annex to Convention IV. of 1907, which expanded and amended the provisions of the Declaration of Brussels and of the Convention of 1899, and was ratified on behalf of Great Britain in November 1909. After laying it down that the choice of means of injuring the enemy is not unlimited,<sup>1</sup> the rules particularly forbid the following acts:<sup>2</sup>—

Limits of permissible Violence.

- (a) *The use of poison or poisoned weapons.*
- (b) *The treacherous killing or wounding of individuals belonging to the enemy nation, or army.*
- (c) *The killing or wounding of an enemy who has surrendered at discretion, having thrown down his arms, or possessing no longer the means of defending himself.*
- (d) *The declaration that no quarter will be given.*
- (e) *The use of arms, projectiles or substances likely to cause unnecessary suffering.*
- (f) *The abuse of flags of truce, of the national flag, or of military badges and uniforms belonging to the enemy, as well as of the badges peculiar to the Geneva Convention.*
- (g) *Any destruction or seizure of enemy property not imperatively called for by military necessities.*
- (h) *The declaration that rights, and rights of action, of nationals of the enemy are extinguished, suspended or unenforceable in courts of law.*
- (i) *The forcing by a belligerent of the nationals of the enemy to take part in operations of war directed*

<sup>1</sup> Art. 22.

<sup>2</sup> Art. 23.



Limits of permissible Violence.

*against their country, even in cases where they may have been in his (the belligerent's) service before the outbreak of the war.*

13. Further it was laid down by Article 44 that a belligerent might not compel the population of occupied territory to give information about the army of the other belligerent or his means of defence: though in Article 24, which expressly recognised 'ruses of war' as legitimate, it was also declared permissible to use the means necessary to obtain information about the enemy and the country, and Article 52 provided that neither requisitions in kind nor services could be demanded from communes or inhabitants 'except for the needs of the army of occupation,' and then only in proportion to the resources of the country, and of such a nature as not to imply for the population the necessity of taking part in operations of war against their country.

Of the above provisions (a) to (g) were a repetition of the rules of the Brussels Conference and the Convention of 1899; and the prohibitions contained in special Conventions (e.g., the Declaration of St. Petersburg of 1868, which forbade the use of any projectile of a weight below 400 grammes [about 14 oz.], which is either explosive or charged with fulminating or inflammatory matter) were incorporated by reference. Rule (h), however, and Article 44 represent important innovations.

Rights of Action.

14. The rule against the restriction of rights of action was proposed by Germany<sup>1</sup> as an extension of the inviolability of enemy property to incorporeal property, and it was unanimously adopted: but it is not at all certain what it means. Germany appears to understand it as a complete reversal of the hitherto established principle that the outbreak of war results in the extinction or suspension of all rights of action between the belligerent states<sup>2</sup> and their respective subjects. This is the meaning which the words, on the face of them, bear; but it is remarkable that so startling an innovation in the law of international obligations should be thus found sandwiched in the middle of a series of instructions to commanders in the field. Professor Holland,<sup>3</sup> with good reason, doubts whether, in spite of the ratification of the Convention

<sup>1</sup> Pearce Higgins, p. 263.

<sup>2</sup> See p. III, *supra*.

<sup>3</sup> *The Laws of War on Land*, p. 44.



(which, as we have already pointed out, did not bind the signatories to accept specifically each of the Articles, but only to issue instructions in conformity with them to their armed forces) this rule can be taken to have made this substantial alteration in the law: and in the courts of Great Britain, at any rate, it probably could not be carried into effect without municipal legislation.

The alternative interpretation of the rule treats it merely as an instruction to an invading commander that he is not to refuse redress to enemy subjects when they bring well-founded complaints against the conduct of his troops, and an instruction to the invading state that it is not, in any courts it may set up in the occupied territory, to disregard in favour of its own subjects, the rights of enemy subjects. Read in this way the rule is more in harmony with those which it accompanies: but such an interpretation narrows down the application of the words in a way which can only be justified by a general reference to the subject-matter of the whole Article. International documents are, it is true, construed with a freedom from technical rules which the judges in a British court do not enjoy; but this seems an extreme case of disregard of the primary meaning of words.

15. The provisions with regard to the compulsion which may be applied to an invaded population also leave room for doubt, and were only arrived at after much difference of opinion. Article 36 of the Declaration of Brussels only prohibited compulsion on the population to take part in military operations against its own country, and this provision was repeated in the Convention of 1899 (Art. 44). In 1907, the discussion centred round the forced employment of the inhabitants as guides.<sup>1</sup> Austria and Russia insisted that such an operation was permissible, but met with strong opposition from France, Belgium, Holland and Switzerland. The ultimate decision was to forbid such employment, but the Convention was only signed by Germany, Austria, Japan and Russia subject to a reservation as to Article 44.

The general effect of the provisions on this point may be stated thus:—The means may be employed which are necessary to obtain information about the enemy and the country

<sup>1</sup> Pearce Higgins, p. 265 *seq.*

Compulsion applied to Population.

(Art. 24); but among such means must not be included the compulsion of enemy subjects to take part in operations of war directed against their country (Art. 23); and the furnishing of information about the army of the other belligerent or his means of defence is to be regarded as 'taking part in an operation of war' for this purpose (Art. 44). Subject to this restriction forced services may be demanded from the inhabitants, if they are necessary for the army of occupation (Art. 52).

Germany objected to Article 44, on the ground that it was unnecessary to specify a particular kind of 'operation of war,' which was sufficiently covered by the more general terms of Article 23. That the other dissentient powers recognised that Article 23 did include the forced employment of guides among the prohibited operations seems clear by the Austrian attempt to restrict that clause to a prohibition against compelling the inhabitants to take part in the operations of war 'as combatants': and by assenting to that Article without the addition of these two words they may, strictly speaking, be taken to have acquiesced in the principle that such forced employment of guides is not permissible, but whether they will accept this interpretation of the meaning of the Articles as ultimately settled remains to be seen.

Sieges and Bombardments.

16. The practice of sieges and bombardments is regulated as follows:—

Towns, villages, dwelling-houses, and buildings may neither be attacked nor bombarded by any means whatever, unless they are defended.<sup>1</sup> The words, 'by any means whatever' were added in 1907, to cover the case of bombardment from balloons. The whole question of balloon attacks was fully discussed in 1899, when a Declaration<sup>2</sup> was adopted (but only for a period of five years, which expired in 1905), prohibiting the discharge of projectiles or explosives from balloons, or by other new and analogous methods. In 1907 the question was raised again. It was now clear that balloons in warfare for purposes other than reconnoitring were a practical possibility. The Declaration<sup>3</sup> was renewed, but only for a period extending to the termination of the Third Peace Conference: it was ratified by Great Britain in November 1909, but as Germany, France, Italy, Russia,

<sup>1</sup> Art. 25.

<sup>2</sup> Declaration I. of 1899.

<sup>3</sup> Declaration XIV. of 1907.



Spain and Japan have all refused to sign it, it is obviously of little, if any, value. It was only on the prohibition of such a method of attack on undefended towns that it was possible to arrive at unanimity. With the developments of aerial navigation during the past year (1910), it has become fairly clear that no power is likely to bind itself not to take advantage of the new science to the full, except with the limitation above stated.

The officer in command of attacking troops before beginning to bombard, except in cases of assault, should do all that he can to warn the authorities.<sup>1</sup>

In sieges and bombardments everything possible should be done to spare buildings devoted to worship, art, science, and charity, historical monuments,<sup>2</sup> hospitals, and the resorts of the sick and wounded, so long as they are not used at the same time for military purposes.<sup>3</sup>

The besieged should indicate such buildings beforehand to the besieger by conspicuous and distinctive marks.<sup>2</sup>

A town even when taken by storm may not be handed over to pillagers.<sup>4</sup>

17. A controversy of much gravity, and one of which more will be heard in the future, has been raised as to the propriety of holding to ransom, and failing payment, of bombarding the undefended coast towns of an enemy. The provisions as to bombardment already quoted relate, it must be noted, only to operations on land. In an article,<sup>5</sup> which became sufficiently notorious to attract the diplomatic attention of the British Government, M. le Contre-amiral Aube advocated a maritime policy for his own country which suggested alarming possibilities for the future. His argument had the merit of simplicity. War may be defined as the appeal of Right against Violence denying that Right: it follows that the paramount aim of war is to injure the enemy in every possible way. The nerves of war are wealth; consequently everything which strikes at the enemy's wealth, and still more at the sources of that wealth, becomes not merely legitimate, but obligatory. So we must expect in the future to see armed squadrons turn their powers of attack and destruction against coast towns, whether or not they be fortified, whether or not

Sieges and Bombardments

Bombardment of Coast Towns.

<sup>1</sup> Art. 26.

<sup>2</sup> Added in 1907.

<sup>3</sup> Art. 27.

<sup>4</sup> Art. 28.

<sup>5</sup> *Revue des Deux Mondes*, 1882, 314-346.



Bombardment of Coast Towns. they be defended : they will burn them, destroy them, or at least hold them mercilessly to ransom.

Mr. Hall<sup>1</sup> adds the significant facts that Admiral Aube was appointed Minister of Marine soon after the publication of this article, that he gave orders for a class of vessels specially suited to carry out the designs recommended in it, and that in 1878 the Russian fleet at Vladivostock was about to sail for Australia, with the intention of holding the undefended coast towns to ransom. Further, during the British naval manœuvres of 1888 the attacking fleet purported to bombard, and to levy contributions upon, various places along the coast : and though Professor Holland protested strongly in the *Times*,<sup>2</sup> a considerable body of high naval authority took up the position that such a proceeding was perfectly justified, and a committee of admirals reported in its favour in 1889. The reasons given, apart from the frank anarchy of one officer, who stated that 'the talk about international law is all nonsense,' seemed to be chiefly based on the feeling that other nations would adopt every possible means in war of weakening Great Britain, and that the bombardment of coast towns would be the most efficacious method to be found. If this was the fear, it was hardly wise for Great Britain to provide other nations with a valuable precedent to be used against her. Wellington in 1844 had described such a method of warfare as 'disclaimed by the civilised portions of mankind.'<sup>3</sup> It is contended<sup>4</sup> that the bombardment of places occupied by non-combatants is on the same level of illegality as devastation, that it is proposed to 'introduce for the first time into modern maritime hostilities a practice which has been abandoned as brutal in hostilities on land,' and that the analogy of contributions on land affords no sort of justification for the enforcement of ransom by a hostile squadron. Such contributions 'are a totally different matter from demanding a sum of money or negotiable promises to pay, under penalty of destruction, from a place in which [the belligerent] is not, which he probably dare not enter, which he cannot hold even temporarily, and where consequently he is unable to seize and carry away.'

<sup>1</sup> 6th ed. p. 427.

<sup>2</sup> *Letters to the 'Times' upon War and Neutrality*, p. 73 seq.

<sup>3</sup> *Ibid.*, p. 79.

<sup>4</sup> Hall, 6th ed. pp. 428-430.

18. It may at once be admitted that the practice of bombarding undefended towns would be the occasion of much suffering to persons upon whom the incidence of belligerent pressure has been generally deemed illegitimate; nor can it be denied that a very grave accession to the inhumanities of war would be involved in its recognition. It may also be properly pointed out that before acts of this kind are done, states are likely to reflect that reprisals may be made, and that reprisals need not be confined to acts identical with those which have called them forth. Such arguments are indeed likely to be more effective than others based upon the attribution to non-combatant property of an absolute right to immunity from capture or destruction. The contention that such property is immune is equally destructive of the claim to capture or destroy enemy private property on board enemy merchant vessels. Admiral Aube points out that in the American Civil War Confederate cruisers destroyed in a single month<sup>1</sup> 239 American vessels with an aggregate tonnage of 104,000, and value of 15,000,000 dollars. In cases where resistance was offered, it is reasonable to imagine that 'devastation and the slaughter of non-combatants' were not wanting to reinforce the persuasiveness of the summons to lie-to. Illustrations of this kind bring into curious relief the artificiality of much international practice. The most effective mode in which to meet Admiral Aube's suggestions is surely to say simply that the mode of belligerency advocated has never been practised or sanctioned, that it is strikingly inhumane, and would afford good ground for serious reprisals. It is hardly convincing to distinguish between the ransom which Admiral Aube recommends, and the contributions which are undoubtedly legal in land warfare, on the ground that 'ability to seize, and the further ability, which is also consequent upon actual presence in a place, to take hostages for securing payment, are indissolubly mixed up with the right to levy contributions.'<sup>2</sup> Mr. Hall is driven to admit that contributions may be exacted by a squadron which is prepared to enforce payment by landing a force: in other words a ransom may be extorted at the barrel of a revolver which is denied to the cannon. 'A levy of money,' Mr. Hall continues,<sup>3</sup> 'made in

Bombardment of  
Coast Towns

<sup>1</sup> May 1864.

<sup>3</sup> *Ibid.*, p. 430.

<sup>2</sup> Hall, 6th ed. p. 429.



Bombardment of  
Coast Towns.

any other manner than this is not properly a contribution at all. It is a ransom from destruction. If it is permissible, it is permissible because there is a right to devastate, and because ransom is a mitigation of that right.' Might it not be argued with equal force that a contribution is a ransom from destruction? Certainly destruction would follow sharply, where an attempt to resist the levying of a contribution coincided with ability to pay it. Similarly it might be argued that if contributions are permissible, they are permissible because there is a right to destroy. The answer is that there may in the abstract exist the right to destroy upon refusal to pay the contribution, without there existing an absolute right to destroy, of which contribution or ransom is a mitigation. But however unconvincing it may be from the logical point of view, this distinction between ransom and contribution has been incorporated in the agreement which has ultimately been reached on the subject. The Hague Conference of 1899 did nothing but express a 'wish' that the whole question be referred to a subsequent conference. The United States in their Naval War Code of 1900<sup>1</sup> prohibited the bombardment of unfortified and undefended places, 'except when such bombardment is incidental to the destruction of military or naval establishments, public depôts of munitions of war, or vessels of war in ports, or unless reasonable requisitions for provisions and supplies essential at the same time to such naval vessel or vessels are forcibly withheld, in which case due notice of bombardment shall be given': and bombardment for non-payment of ransom is specifically forbidden.

19. In 1907 at the Hague a substantial agreement was arrived at between the great majority of the powers represented (Spain alone of the European powers has not yet signed), and was embodied in Convention IX. The bombardment by naval forces of undefended ports, towns, villages or buildings was forbidden<sup>2</sup>: but this general prohibition was very materially qualified by exceptions. In the first place, there was no unanimity on the point as to what is meant by 'undefended.' Are floating mines a 'defence'? On the face of it the answer would seem to be in the affirmative, a view which was taken by Great Britain, France, Germany, Japan and Spain,<sup>3</sup> all of

<sup>1</sup> See Pearce Higgins, p. 353.

<sup>3</sup> See Pearce Higgins, p. 354.

<sup>2</sup> Art. 1.



which powers declined to agree to a clause which was inserted to the effect that the mere fact of automatic submarine contact mines being anchored off the harbour shall not be a justification for bombardment.<sup>1</sup> If a belligerent refrains from bombarding, he is entitled to immunity from danger, so far as the port or place which he so respects is concerned: even as in land warfare he does not kill or capture the civil population because, and only so long as, they are harmless. But it is obvious that nice questions may arise whose decision can only be left to the discretion of the belligerent commander. It will often be difficult to say exactly what place is protected by mines, for mines laid for the protection of a naval base may cover an area which includes several innocent coast towns. The objection to the clause referred to above will probably not be taken as involving a claim to direct a fire upon the residential parts of Southampton, or upon the Isle of Wight, merely because a line of mines at sea is laid for the defence of Portsmouth. The question is one which can only be decided upon the circumstances of each case: and it can only be hoped that the belligerent in such a case will bear in mind and apply by analogy the rule which directs him in bombarding military works and establishments which are part of a town, to do as little harm as possible to the rest of the town.<sup>2</sup> But it certainly seems not unreasonable to reserve power to bombard a purely civilian town which having all the appearance of harmlessness is nevertheless surrounded with mines: and this reservation will have done good if it produces greater caution in the use of such mines, which were proved in the Russo-Japanese war to involve great danger to neutral shipping. The whole question of their use formed the subject, as we shall see, of a Convention in 1907.<sup>3</sup>

The prohibition against bombardment does not, of course, apply to military works, military or naval establishments, depôts of arms or material of war, workshops or plant, suitable for use for the needs of the fleet or army, and ships of war in the port. Such things may be destroyed after a summons to the local authorities and a reasonable interval giving an opportunity to the local authorities to destroy them themselves: and if there is no time for such summons and delay, care must be taken to do as little injury as possible to the town, though

<sup>1</sup> Art. 1.

<sup>2</sup> Art. 2.

<sup>3</sup> See p. 140, *infra*.

Bombardment of  
Coast Towns.

Bombardment of the belligerent is not to be held responsible for unavoidable  
Coast Towns. damage done in the course of a permissible bombardment of  
this kind.<sup>1</sup> The word 'plant' ('installations') was used as being  
sufficiently vague to cover railway depôts, floating docks, coal  
depôts and other things reasonably likely to be of use in  
war.<sup>2</sup>

20. A further and most important exception was made, which embodies the distinction already referred to between 'ransom' and 'requisitions.' After due notice a belligerent may bombard undefended ports, etc., if, after summons, the local authorities decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question. Such requisitions are to be proportionate to the resources of the place, shall only be demanded in the name of the commander of the naval force, and shall as far as possible be paid for in ready money: and if that is not possible, receipts are to be given:<sup>3</sup> but bombardment merely on account of the refusal to pay money contributions is forbidden.<sup>4</sup> The word 'ransom' was not used, lest it should lead to an inference that in principle the exaction of ransom was permissible.<sup>5</sup>

These provisions, again, are necessarily vague, and can hardly be regarded as anything more than an expression of a hope that a belligerent commander will do his best to comply with them. He cannot ascertain, save in the most rough-and-ready way, what are the resources of the place, and he alone can be the judge of what supplies are necessary for the immediate use of his force: but the inculcation of the rule that he cannot demand money contributions, and that he can only demand supplies for that portion of the fleet which is before the place in question, may not unreasonably be expected to exercise a restraining influence.

The Convention concludes with provisions similar to those laid down for land warfare, for the protection in all bombardments of buildings devoted to public worship, art, science, or charitable purposes, historic monuments and hospitals (all of which are to be indicated by a special sign), for due warning, where military exigencies permit of such warning, and for the prevention of pillage.<sup>6</sup>

<sup>1</sup> Art. 2.<sup>2</sup> Pearce Higgins, p. 355.<sup>3</sup> Art. 3.<sup>4</sup> Art. 4.<sup>5</sup> Pearce Higgins, p. 356.<sup>6</sup> Arts. 5, 6, 7.



The Convention (No. IX. of 1907) was ratified on behalf of Great Britain in November 1909.

21. The permissibility of the use of the Dum-Dum bullet (Mark IV. Pattern), which has a small cylindrical cavity in the head, over which the hard metal envelope is turned down, was much discussed at the Hague in 1899. Explosive bullets have been discontinued since the Declaration of St. Petersburg, 1868; but the representatives of Great Britain in 1899 refused to concur in an agreement which would have required all bullets to be cased in hard envelopes. The Conference drew up a Declaration<sup>1</sup> in favour of abstention from the use of bullets 'which expand or flatten easily in the human body, such as bullets with a hard envelope, which does not entirely cover the case, or is pierced with incisions.' But Lord Lansdowne instructed Sir Julian Pauncefote to inform the Conference that the Chitral campaign of 1895 had demonstrated the insufficiency of a hard envelope for stopping a rush in savage warfare. On this ground, and contending that the Dum-Dum bullet did not inflict unnecessary suffering, the British Government (and with them the United States) refused to sign this Declaration: but the objection was, so far as Great Britain was concerned, based only on the argument from savage warfare, as the bullet was not used by that country in the Boer War, and its use occasionally by the Boers formed the subject of strong protests. However, in 1907, Great Britain and Portugal intimated their accession to the Declaration, and of the larger powers only the United States has not yet assented to it,<sup>2</sup> though willing to agree to the prohibition of bullets inflicting unnecessarily cruel wounds, or exceeding the limit necessary for placing a man *hors de combat*.

22. The Conference of 1899 also adopted a Declaration<sup>3</sup> against the use of projectiles which have for their sole object the diffusing of asphyxiating or deleterious gases. Here, again, Great Britain withheld assent (only because the Conference was not unanimous), but acceded to the Declaration in 1907; while the United States are still dissentient on the ground that enough is not yet known as to effect of such projectiles for it to be possible to decide whether they are more or less humane than other methods of warfare.

<sup>1</sup> Declaration III. of 1899.

<sup>2</sup> Pearce Higgins, p. 496.

<sup>3</sup> Declaration II. of 1899.

Dum-Dum  
Bullets.

Asphyxiating  
Gases.



## Mines.

23. The question of the use of submarine mines is of exceptional importance because the interests of neutrals are directly affected. China, at the Hague in 1907, estimated that from five to six hundred Chinese subjects had been killed by the mines with which the seas were scattered during the Russo-Japanese War.<sup>1</sup> The Institute of International Law considered the question in 1906, and adopted rules<sup>2</sup> prohibiting the placing of anchored or floating mines in the high seas, and prohibiting belligerents from placing mines in their own waters or those of the enemy which were liable on displacement to be a danger to navigation outside such waters. This latter rule was to apply to neutrals who might place in their waters any mechanical contrivances for the safeguarding of their own neutrality: and neutrals were to be forbidden to place such in the passage of straits leading to the open sea. In all cases notification to neutral commerce was to be obligatory, and the state violating these rules was to be responsible for any damage done.

24. At the Hague Conference of 1907<sup>3</sup> there was much difference of opinion on the subject. Great Britain was anxious for the total prohibition of automatic submarine contact mines which are unanchored or which do not become harmless on breaking from their moorings: for the total prohibition of the employment of such mines for the purposes of commercial blockades: and for the restriction of the right of laying mines to the territorial waters of the belligerents, with an extension to 10 miles (subject to proper warning to neutrals) in the case of the defence of military ports, having at least one large graving-dock, and provided with the equipment necessary for the construction and repair of ships of war, and in which a staff of workmen paid by the state to construct and repair ships of war is maintained in time of peace. There was, however, an unwillingness on the part of states with small navies (*e.g.*, Italy) to give up the right to use unanchored mines, though it was agreed that they ought to be so constructed as to become harmless after a short time: and there was also an objection, particularly on the part of Germany, to the restriction of the right of laying mines to territorial waters. Finally, after much discussion, a Conven-

<sup>1</sup> Pearce Higgins, p. 329.

<sup>2</sup> *Ibid.*, p. 332.

<sup>3</sup> See Pearce Higgins, p. 328 *et seq.*

tion<sup>1</sup> was drawn up, which was signed, subject to many Mines. reservations: Great Britain in particular declaring that it could not be taken as conclusive, or as more than a first step towards the provision of adequate guarantees for the protection of the undoubted rights of neutral shipping. The Convention was ratified on behalf of Great Britain in November 1909, with the reservation of the right to treat as unlawful acts not prohibited by it.

25. By its preamble the Convention is admittedly merely provisional 'until such time as it may be found possible to formulate rules on the subject, which shall insure to the interests involved all the guarantees desirable.' The laying of unanchored automatic contact mines was forbidden, unless they are so constructed as to become harmless one hour at most after those who laid them have lost control over them.<sup>2</sup> This was objected to by Germany: which was, however, willing to forbid the use of unanchored mines altogether for five years, an offer which was not accepted by a sufficient majority. It was also forbidden to lay anchored mines which do not become harmless as soon as they have broken loose from their moorings, or to use torpedoes which do not become harmless when they have missed their mark.<sup>3</sup> But the whole effect of these restrictions was weakened by a subsequent provision that powers which do not own perfected mines of the description referred to, and which consequently could not at present carry out the rules, undertake to convert the *matériel* of their mines as soon as possible, so as to bring it into conformity with these requirements. Great Britain attempted, but without success, to procure the insertion of a time limit.

26. Various efforts were made to limit the area within which mines may be laid, but nothing could be agreed upon except that 'the laying of automatic contact mines off the coasts and ports of the enemy, with the sole object of intercepting commercial shipping, is forbidden';<sup>4</sup> and to this Germany objected on the very good ground that it means nothing, as the belligerent who lays the mines will invariably declare that he has some other object in view. There is practically nothing, therefore, in the Convention to prohibit blockade by mine: which is probably a violation of the rule that a blockade, to be valid,

<sup>1</sup> No. VIII. of 1907.    <sup>2</sup> Art. 1 (1).    <sup>3</sup> Art. 1 (2) and (3).    <sup>4</sup> Art. 2.



Mines.

must be effective, and substitutes immediate destruction without inquiry, in the place of capture, as the penalty for blockade-running. An attempt was made to procure the prohibition of the employment of anchored mines except for defence and coast protection, but this also failed to secure sufficient support. It was further provided that, when anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping: and belligerents undertook to do their utmost to render these mines harmless after the lapse of a limited time, and should they cease to be under observation, to notify the danger-zones as soon as military exigencies permit, by a notice to mariners and neutral Governments.<sup>1</sup> The same rules were laid down for neutrals who laid mines off their coasts,<sup>2</sup> and each power undertook to do its best, at the close of a war, to remove the mines it had laid.<sup>3</sup>

27. On behalf of Great Britain, Sir Ernest Satow pointed out<sup>4</sup> that the Convention imposed no restriction as to the placing of anchored mines, 'which consequently may be laid wherever the belligerent chooses: in his own waters for self defence, in the waters of the enemy as a means of attack, or, lastly, on the high seas, so that neutral navigation will inevitably run great risks in time of naval war, and may be exposed to many a disaster.' In fact, the only substantial result of the Conference is the prohibition of the use of floating mines or anchored mines, which may break loose, unless they are so constructed as to become harmless within a very short time: and this will only be substantial if states refrain from availing themselves of the very large loophole provided by Article 6.

In view of these considerations, Great Britain, as has already been stated, reserved the right to treat as unlawful acts not prohibited by the Convention: and the Convention itself contained an agreement<sup>5</sup> to re-open the whole question six months before the expiration of the period of seven years for which it was to remain in force, in the event of the question not having been taken up and settled by the Third Peace Conference. In the meanwhile, the Institute of International Law<sup>6</sup> are considering a series of rules which would

<sup>1</sup> Art. 3.

<sup>2</sup> Art. 4.

<sup>3</sup> Art. 5.

<sup>4</sup> *Parl. Papers*, Misc., No. 4 (1908), p. 54; and see Pearce Higgins, pp. 340-345.

<sup>5</sup> Art. 12.

<sup>6</sup> Pearce Higgins, p. 344.



forbid absolutely the placing of mines, anchored or unanchored, Mines.  
in the high seas, and would insist on the harmlessness (in the  
case of unanchored mines, one hour at the most after control  
over them has been lost) of either kind if they are lying loose  
in territorial waters.

28. A prisoner of war is defined by the American regula- Prisoners of  
tions as 'a public enemy armed or attached to the hostile army War.  
for active aid who has fallen into the hands of the captor . . .  
by individual surrender or capitulation. Quarter may not  
be refused to such persons. They may be detained till the  
conclusion of war, or they may be exchanged, or released  
on parole. They are, of course, subject to no punishment,  
and must, so far as possible, be supplied with reasonable  
nourishment.'

The Hague Conferences reasserted most of the Articles of  
the Brussels Declaration on the subject of prisoners of war.<sup>1</sup>  
It is laid down that they are in the power of the hostile  
Government, and not of any individual or corps; that they  
must be humanely treated, and that all their personal belong-  
ings, except arms, horses, and military papers, remain their  
property.<sup>2</sup> They may be interned in a town, fortress, camp,  
or any other locality, and are bound not to go beyond certain  
fixed limits: but they can only be confined as an indispen-  
sable measure of safety,<sup>3</sup> and only while the circumstances  
which necessitate their confinement continue to exist,<sup>4</sup> con-  
finement being more stringent than internment. The state  
may utilise the labour of prisoners of war other than officers<sup>5</sup>  
(who, however, are in proper cases to be allowed full pay,  
which must be repaid by their Government),<sup>6</sup> according to  
their rank and aptitude. Their tasks shall not be excessive,  
and shall have nothing to do with the military operations,  
and they are to be paid for such work (if it is in the public  
service) according to the scale in force for soldiers doing  
similar work, or, if there is no such scale fixed, at rates  
proportional to the work done.<sup>7</sup> The wages of prisoners  
shall go towards improving their position, and the balance  
shall be paid them at the time of their release, after deducting  
the cost of their maintenance.<sup>8</sup>

<sup>1</sup> Annexes to Conventions II. of 1899 and IV. of 1907, Arts. 4-20.

<sup>2</sup> Art. 4.

<sup>3</sup> Art. 5.

<sup>4</sup> These last words were added in 1907.

<sup>5</sup> Added in 1907.

<sup>6</sup> Art. 17.

<sup>7</sup> Added in 1907.

<sup>8</sup> Art. 6.

## Prisoners of War.

29. The Government into whose hands prisoners of war have fallen is bound to maintain them. Failing a special agreement between the belligerents, they shall be treated as regards food, quarters, and clothing on the same footing as the troops of the Government which has captured them.<sup>1</sup> Prisoners of war shall be subject to the laws, regulations and orders in force in the army of the state into whose hands they have fallen. Any act of insubordination warrants the adoption, as regards them, of such measures of severity as may be necessary. Escaped prisoners, recaptured before they have succeeded in rejoining their army, or before quitting the territory occupied by the army that captured them, are liable to disciplinary punishment. Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment for the previous flight.<sup>2</sup>

Every prisoner of war, if questioned, is bound to declare his true name and rank, and, if he disregards this rule, he is liable to a curtailment of the advantages accorded to the prisoners of his class.<sup>3</sup>

Prisoners may be set at liberty on parole if the laws of their country authorise it, and in such a case they are bound, on their personal honour, scrupulously to fulfil the engagements they have contracted, and their own Government may not require or accept from them any service contrary to the parole given.<sup>4</sup> A prisoner of war cannot be forced to accept his liberty on parole: similarly the hostile Government is not obliged to assent to the prisoner's request to be set at liberty on parole.<sup>5</sup>

Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying.<sup>6</sup>

30. Provision is also made for the institution of an information bureau for the purpose of answering all inquiries about prisoners, collecting and forwarding objects of personal use, valuables and letters, etc.<sup>7</sup> Special provision is made for facilitating the work of Relief Societies<sup>8</sup> for the admission free

<sup>1</sup> Art. 7.<sup>2</sup> Art. 8.<sup>3</sup> Art. 9.<sup>4</sup> Art. 10.<sup>5</sup> Art. 11. The punishment for breach of parole is death.<sup>6</sup> Art. 13.<sup>7</sup> Art. 14.<sup>8</sup> Art. 15.



of duty of gifts and relief in kind,<sup>1</sup> and for the free exercise by prisoners of their religion,<sup>2</sup> and of their right of making wills.<sup>3</sup>

31. These rules have no application to captured spies. Spies. Of spies, Vattel<sup>4</sup> says: 'They are generally condemned to capital punishment, and not unjustly. . . . For this reason a man of honour, who would not expose himself to die by the hands of the common executioner, ever declines serving as a spy. He considers it beneath him, as it seldom can be done without some kind of treachery.' This view has received the sanction of both writers and soldiers, but it is difficult to defend upon satisfactory grounds. Stratagems and ruses are universally practised in war, and it is not easy to see that spying, unless aggravated by dishonouring circumstances in no way essential to it, is morally more culpable. The distastefulness of the employment, and its lack of distinction, together with the distressing nature of the penalty risked, call for remarkable valour and constancy in the spy. Lord Wolseley has recognised the reasonableness of the view in the following observations: 'As a nation we are brought up to feel it a disgrace even to succeed by falsehood. The word "spy" conveys something as repulsive as "slave." We keep hammering along with the conviction that "honesty is the best policy," and that truth always wins in the long-run. These sentiments do well for a copybook, but a man who acts upon them had better sheath his sword for ever.'<sup>5</sup> A spy was defined in 1899 and 1907<sup>6</sup> as a person who, acting clandestinely or on false pretences gathers, or seeks to gather, information in the zone of operations of a belligerent with the intention of communicating it to the adverse party. Soldiers, not disguised, who have penetrated into the zone of operations of the enemy with this object, are not to be treated as spies: nor are soldiers, or civilians, openly carrying out their mission, charged with conveying dispatches for their own or the enemy's army, nor persons sent in balloons to convey dispatches, or to maintain communication between the various parts of an army or territory. A spy cannot be

<sup>1</sup> Art. 16.

<sup>2</sup> Art. 18.

<sup>3</sup> Art. 19.

<sup>4</sup> *Droit des gens*, liv. III. c. x. §§ 179, 182, quoted by Halleck.

<sup>5</sup> If the objection to spying is a moral one, the part played by those who employ him would appear to be less respectable than that of the spy himself. The latter at least puts his own neck into danger.

<sup>6</sup> Art. 29 of Annex to Convention II. of 1899 and IV. of 1907.



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punished without trial<sup>1</sup> and cannot be treated as a spy if captured after he has rejoined his own army.

32. The Convention of Geneva of 1864<sup>2</sup> did much to ameliorate the condition of the sick and wounded: and a supplementary Conference at Geneva in 1868 drew up a Convention in part amending that of 1864, and in part extending its principles to naval warfare, which was in fact never ratified. At the Hague, in 1899, the Swiss Government were requested to call a Conference to revise these rules, and at Geneva, in 1906, a further Convention was drawn up and ratified by a number of powers, but not by all those who had acceded to the Convention of 1864. Of the more important powers Austria, Germany, Great Britain, Italy, Japan, Russia, Spain, the United States and Turkey are at present bound by the Convention of 1906: while China, France, Greece, Holland, Norway and Sweden are still subject to that of 1864.

33. By the Convention of 1906, the sick and wounded are to be taken care of without distinction of nationality, but a belligerent when compelled to abandon his own sick and wounded must, so far as military exigencies permit, leave with them a portion of his medical *personnel* and material.<sup>3</sup> The sick and wounded are prisoners of war.<sup>4</sup> Provision is made for a proper search of the field of battle, for protection against pillage and maltreatment,<sup>5</sup> and for the exchange of information as to the wounded and dead. It is left to the discretion of the military authorities to appeal to the charitable zeal of the inhabitants to assist in the task of collecting and taking care of the wounded.<sup>6</sup> Medical units (*les formations sanitaires mobiles*) and the establishments of the medical service, (*les établissements fixes du service de santé*) are protected,<sup>7</sup> together with their *personnel* and guards, and all persons engaged exclusively in the collection, transport and treatment of the wounded and the sick;<sup>8</sup> as also is the *personnel* of duly-recognised and notified Voluntary Aid Societies.<sup>9</sup> The medical staff if captured by the enemy are not prisoners, but must continue to carry on their duties under his direction,<sup>10</sup> receiving the usual pay and retaining their material, subject to the necessities of the enemy, who is to restore anything he

<sup>1</sup> Art. 30.<sup>2</sup> Pearce Higgins, pp. 12 and 35.<sup>3</sup> Art. 1.<sup>4</sup> Art. 2.<sup>5</sup> Art. 4.<sup>6</sup> Art. 5.<sup>7</sup> Cf. p. 121.<sup>8</sup> Arts. 6, 7, 8, 9.<sup>9</sup> Art. 10.<sup>10</sup> Art. 12.

may borrow.<sup>1</sup> Convoys of evacuation are similarly protected,<sup>2</sup> and provision is made for the use and observance of the 'Red Cross,'<sup>3</sup> though Great Britain was unable to agree to the prohibition of the use of this emblem 'either in time of peace or war except to protect or to indicate the medical units, etc., protected by the 'Convention,'<sup>4</sup> or to the undertaking to legislate or propose legislation for the enforcement of this prohibition,<sup>5</sup> provisions which were specially directed against the use of the Red Cross as a trade-mark. The objection to these provisions was not based on principle but on practical difficulties.

<sup>2</sup> Treatment of Wounded.

The signatory powers undertook to instruct their troops in the provisions of the Convention, and to bring these provisions to the notice of the civil population,<sup>6</sup> and to take such measures as should be necessary for the repression of pillage, and of the maltreatment of the sick and wounded; and the Convention ended with a 'vœu' that if the cases and circumstances permit, the Contracting Powers will submit to the Permanent Court at the Hague any differences which may in time of peace arise between them relative to the interpretation of the Convention. To this, however, Great Britain and Japan refused to assent.

34. An attempt was made in 1868 as we have seen,<sup>7</sup> to apply these principles to naval warfare, but it was not till 1899 that anything definite was done. In that year there was drawn up at the Hague a Convention on the subject, and this with certain alterations made in 1907<sup>8</sup> (due chiefly to the intervening Geneva Convention of 1906), is now accepted with a few reservations by all the powers present at the Conference of 1907: though the Convention (No. X. of 1907) has not yet been ratified by Great Britain.

By this Convention hospital ships under a belligerent control and duly notified are declared free from capture and from the restrictions applicable to war ships calling at neutral ports: and that whether they are equipped by the state, or by private individuals or societies whether of belligerent or neutral nationality.<sup>9</sup> They must afford relief without distinction of nationality, and must not be used for any military

<sup>1</sup> Arts. 13 and 14.

<sup>2</sup> Art. 17.

<sup>3</sup> Arts. 18-23.

<sup>4</sup> Art. 23.

<sup>5</sup> Arts. 27, 28.

<sup>6</sup> Art. 26.

<sup>7</sup> See p. 120.

<sup>8</sup> Convention III. of 1899 and X. of 1907.

<sup>9</sup> Arts. 1, 2 and 3.



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purpose, or hamper the movements of the combatants: and the belligerents have the right of control and search.<sup>1</sup> They are to be distinguished by being painted white, with a horizontal band of green if equipped by the state, or of red if equipped by private charity, and must fly the Red Cross and their national flag, with, if they are neutral, the flag of the belligerent under whose control they act.<sup>2</sup> The question of protection at night presented difficulties, as any arrangement of lights would lend itself too easily to fraud,<sup>3</sup> and any compulsory carrying of lights would seriously hamper the fleet which was attended by the hospital ships; so the Conference had to be content with a general instruction that hospital ships 'must, subject to the assent of the belligerent they are accompanying, take the necessary measures to render their special painting sufficiently plain.'<sup>4</sup> The use of the signs, in peace or war, for any other purpose is prohibited,<sup>5</sup> but to this Great Britain was unable to agree, for the same reason as was the ground of their refusal to assent to the similar provision in the Geneva Convention of 1906.<sup>6</sup>

35. Provision is made for the protection of the sick bays in the event of a fight on board a vessel;<sup>7</sup> but their inviolability, and that of hospital ships generally is lost if they are made use of to commit acts harmful to the enemy,<sup>8</sup> but not merely by reason of the fact that their staff is armed or wireless telegraphy apparatus is on board.<sup>9</sup> Neutral vessels may be appealed to to take on board and nurse the sick and wounded, and if they do so, whether of their own accord or in response to such appeal, they are to enjoy 'special protection and certain immunities,'<sup>10</sup> according to circumstances. In any case, the mere fact of having the sick and wounded on board is not to subject them to capture, though it cannot in itself confer upon them immunities for other breaches of neutrality which they may be committing or have committed.<sup>7</sup> The staff, religious and medical, are protected as in land war-

<sup>1</sup> Art. 4.<sup>2</sup> Art. 5.<sup>3</sup> See Pearce Higgins, p. 384. In the Russo-Japanese War Japan declined on this ground to accept distinctive lights.<sup>4</sup> Art. 5.<sup>5</sup> Art. 6.<sup>6</sup> See p. 147.<sup>7</sup> Art. 7.<sup>8</sup> Art. 8. Cf. the case of the *Orel*, a hospital ship condemned by the Japanese in 1905 for having carried able-bodied prisoners; (Pearce Higgins, p. 386 Lawrence, *International Problems*, p. 115).<sup>9</sup> Art. 8.<sup>10</sup> Art. 9.



fare,<sup>1</sup> and soldiers, sailors and persons attached officially to the fleets or armies when wounded are to be respected and taken care of by the captors.<sup>2</sup> Treatment of Wounded.

36. Some difficulty was caused by the question of the right of a belligerent to seize wounded, sick or shipwrecked enemy subjects who have been picked up by, and are found on board, a neutral vessel. The right was denied by Great Britain in 1864, when a British yacht had picked up survivors from the *Alabama* off Cherbourg. No agreement on the point was arrived at in 1899: but in 1907 it was provided<sup>3</sup> that any belligerent war ship may demand the surrender of the wounded, sick or shipwrecked who are on board military hospital ships, hospital ships belonging to Relief Societies or private individuals, merchant ships, yachts and boats of whatever nationality. There was some difference of opinion as to whether this was a new rule or a mere re-statement of an old rule, France claiming (in opposition to the view of the British Government) that the right flowed naturally from the right of visit and search and capture, and that, strictly speaking, the mere fact of having enemy combatants on board rendered a neutral vessel liable to confiscation for 'unneutral service.' Great Britain did not accept the new rule in its entirety, but only with the reservation that it should apply 'only to the case of combatants rescued during or after a naval engagement in which they have taken part';<sup>4</sup> thereby maintaining their objection to the theory that it is 'unneutral service' to pick up men in distress, while conceding within limits the reasonableness of the new rule.

It was also provided that the wounded, sick or shipwrecked picked up by a neutral war ship must be so far as possible prevented from taking part in further operations of war.<sup>5</sup> Japan, in 1904, had claimed their surrender in such circumstances.<sup>6</sup> The new rule treats them as they are treated when they are landed on neutral territory.<sup>7</sup> It is to be noted, however, that when landed on neutral territory by a neutral merchant vessel, which has not met or given any undertaking to an enemy war ship, they are

<sup>1</sup> Art. 10.

<sup>2</sup> Art. 11.

<sup>3</sup> Art. 12. See Pearce Higgins, p. 387 *seq.*

<sup>4</sup> *Parl. Papers*, Misc., No. 6 (1908), p. 148.

<sup>5</sup> Art. 13.

<sup>6</sup> Pearce Higgins, p. 390.

<sup>7</sup> Art. 15.

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probably not subject to any such restriction on their future conduct. Further, the shipwrecked, wounded or sick when captured are prisoners of war: and provision is made for a proper search for them after an engagement<sup>1</sup> and the exchange of information with regard to them between the belligerents,<sup>2</sup> as in the case of war on land: and for the instruction of the forces in, and the notification to the public of, the terms of the Convention.<sup>3</sup>

## Taxes and Dues.

37. At a Conference at the Hague, in 1904,<sup>4</sup> a number of powers (including Germany, Austria, the United States, Japan, Russia, France, Spain and Italy) agreed to exempt hospital ships in time of war from all state taxes and dues levied in their ports; but Great Britain, though favourably disposed, declined to take part in the Conference, owing to the fact that these dues are levied by various authorities in her ports and legislation would be necessary.

Flags of Truce,  
Capitulations and  
Armistices.

38. The Declaration of Brussels and the Hague Conventions set out briefly the undisputed law with regard to flags of truce, capitulations and armistices.<sup>5</sup> The inviolability of the bearer of the flag and of those who accompany him is guaranteed,<sup>6</sup> but the enemy commander is not bound to receive him in all circumstances<sup>7</sup> or (and this though not expressly stated in the Convention, is hardly open to dispute) to cease fire at once, though the bearer must not be intentionally injured. All necessary precautions may be taken to prevent the bearer from obtaining information under the protection of the flag, and he may be temporarily detained if guilty of such a breach of confidence:<sup>8</sup> and the inviolability is lost on positive and incontestable proof that he has taken advantage of his privilege to provoke or commit an act of treachery.<sup>9</sup> In this latter case it would appear that he is liable to be treated as a spy, and a distinction is drawn between treachery and obtaining information, which may in practice be somewhat difficult to observe. But it is, no doubt, wise to provide that only the strictest proof of something more than a mere attempt to obtain information shall justify the severest penalty; for only thus can the position of

<sup>1</sup> Art. 16.<sup>2</sup> Art. 17.<sup>3</sup> Art. 20.<sup>4</sup> Pearce Higgins, p. 392.<sup>5</sup> See Convention IV. of 1907.<sup>6</sup> Art. 32.<sup>7</sup> Art. 33.<sup>8</sup> Art. 33.<sup>9</sup> Art. 34.



the flag-bearer be removed from the region of hasty mis-  
understandings and hasty reprisals.

39. Of capitulations or agreements for conditional surrender, all that was laid down was that they must take into account the rules of military honour and be scrupulously observed.<sup>1</sup> Their conditions and circumstances may be infinitely varied, and points may arise as to the authority of those who enter into them, according to the nature of the terms granted and accepted. The case of the capitulation of El Arish in 1800<sup>2</sup> illustrates the necessity in certain cases, for ratification by the state and by a superior commander.

40. Similarly, on the question of armistices or truces, only provisions of a very vague character were agreed upon. An armistice is described as suspending military operations by mutual agreement between the belligerent parties, and if its duration is not defined, the belligerents may resume operations at any time, provided always that the enemy is warned within the time agreed upon in accordance with the terms of the armistice.<sup>3</sup> An armistice may be general (suspending the entire military operations between the parties) or local (suspending the operations between certain portions of their armies and within a fixed area<sup>4</sup>); it must be officially notified in good time:<sup>5</sup> the relations with and between the populations in the theatre of war will be regulated by the terms of the armistice:<sup>6</sup> and any serious violation of the armistice gives the other party the right of denouncing it, and even, in case of urgency, of resuming hostilities at once,<sup>7</sup> unless the breach is by individuals acting on their own initiative, in which case the injured party has only the right of demanding the punishment of the offenders and compensation.<sup>8</sup> The more important question of the things which may be done during an armistice is left untouched. In most cases, no doubt, this will be settled by the terms of the agreement: and in default of agreement the principle to be applied will be the maintenance of the *status quo*: that is to say, neither belligerent can strengthen his position in any way which

Armistices or  
Truces.

<sup>1</sup> Art. 35.

<sup>2</sup> Hall, 6th ed. p. 548.

<sup>3</sup> Art. 36.

<sup>4</sup> Art. 37.

<sup>5</sup> Art. 38.

<sup>6</sup> Art. 39. The English translation is so expressed: but the original French is 'les rapports . . . avec les populations et entre elles,' which seem to mean 'the relations with the populations and between them (the belligerents).' The point is, however, of little importance.

<sup>7</sup> Art. 40.

<sup>8</sup> Art. 41.



Armistices or  
Truces.

might have been prevented by the other had military operations continued.<sup>1</sup> The supply of provisions to a besieged place is usually, and should always be, dealt with by special stipulation: but the principle seems reasonable that such supply as is necessary for immediate consumption does not strengthen the besieged, but merely maintains them in their existing condition. This view, however, has not always been taken. Germany, for instance, in 1870, declined to act upon it when an armistice was granted to Paris; and any commander of a force which has nearly reduced the enemy by starvation may well contend that to let in any provisions at all is to supply the strength for a more prolonged resistance.

The authority to conclude armistices depends upon their purpose and extent, local commanders having power only in their own districts and the authority of the state being necessary for a general armistice.

41. Arrangements between belligerents with regard to such matters as the treatment of flags of truce, intercommunication during the war, whether by post, telegraph or otherwise, the treatment of the wounded, exchange of prisoners and the like, are usually contained in Conventions known as 'cartels'; and 'cartel ships' are ships employed in the carriage of exchanged prisoners and subject to special regulations ensuring that they shall be used in good faith for that object alone.

<sup>1</sup> See Hall, 6th ed. pp. 541-4.

## CHAPTER III

### ENEMY PROPERTY

#### I. ENEMY PROPERTY ON LAND AND OCCUPATION OF ENEMY TERRITORY

I. MANY exceptions to the old rule, that every species of Appropriable enemy property may be appropriated at all times and in all Property. places, have been admitted in the more tolerant practice of modern warfare. The principle underlying such exemptions is not always logically applied, but it has produced practical results of great importance. It is well stated by Mr. Hall in the following passage:<sup>1</sup>—

‘Property can be appropriated, of which immediate use can be made for warlike purposes by the belligerent seizing it, or which, if it reached his enemy, would strengthen the latter either directly or indirectly; but, on the other hand, property not so capable of immediate or direct use, or so capable of strengthening the enemy, is insusceptible of appropriation.’

By the Hague Conventions<sup>2</sup> it was laid down (so far as land warfare is concerned) that private property cannot be confiscated,<sup>3</sup> and that pillage is expressly (*formellement*) forbidden.<sup>4</sup> But all public movable property belonging to the enemy state is subject to capture.

*‘An army of occupation shall only take possession of cash funds and realisable securities which are strictly*

<sup>1</sup> *International Law*, 6th ed. p. 414.

<sup>2</sup> Convention IV. of 1907, amending Convention II. of 1899.

<sup>3</sup> Art. 46.

<sup>4</sup> Art. 47.

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*the property of the state, depôts of arms, means of transport stores and supplies, and generally all movable property belonging to the state which may be used for military operations. Apart from cases governed by naval law, all appliances adapted for the transmission of news, or for the transport of persons or goods, whether on land, at sea, or in the air, depôts of arms, and in general all kinds of war material, may be seized, even if they belong to private individuals, but they must be restored and indemnities for them will be arranged at the conclusion of peace.'*<sup>1</sup>

The words 'realisable securities' (*valeurs exigibles*) are purposely vague.<sup>2</sup> They may mean either documents payable to bearer, or documents payable to order, or constituting merely the evidence of contract debts. The former may undoubtedly be seized and realised: as to the latter there is a difference of opinion which the Conference did nothing to settle. But according to the better view, they can only be realised by an enemy into whose hands they have fallen, when his possessory claim has been converted by conquest into a definitively proprietary right.<sup>3</sup>

2. A very humane modification, and one universally recognised in modern warfare, is contained in Article 56:—

*'The property of local authorities, as well as that of institutions dedicated to public worship, charity, education, and to science and art, even when state property, shall be treated as private property. Any seizure or destruction of, or wilful damage to, institutions of this character, historic monuments and works of science and art, is forbidden, and should be made the subject of proceedings.'*

There can be little doubt that the public feeling of to-day would view with strong resentment any attempt to injure or remove valuable works of art, genius, or taste belonging to

<sup>1</sup> Art. 53.

<sup>2</sup> Holland, *The Laws of War on Land*, p. 57; Westlake, *International Law*, Part II. 'War,' p. 103.

<sup>3</sup> Heffter, § 134; Halleck, vol. ii. p. 62; Phillimore, Part XII. ch. iv.; Hall, 6th ed. p. 414; Westlake, *War*, pp. 103-4.



an enemy. France in her revolutionary wars enriched the galleries of Paris by the Corinthian Horses, the Dying Gladiator, the Apollo Belvedere, the Venus, and the Laocoon. In 1815 all pictures and other monuments of art which had been forcibly seized by Napoleon, or acquired by treaty, were returned to the places from which they had been respectively taken. It was contended that this act of expiatory justice was indefensible in view of Article II. of the military convention under which the allies had entered Paris. That article was as follows: 'Les propriétés publiques, à l'exception de celles qui ont rapport à la guerre, soit qu'elles appartiennent au Gouvernement, soit qu'elles dépendent de l'autorité municipale, seront respectées et les Puissances alliées n'interviendront en aucune manière dans leur administration et gestion.'<sup>1</sup> The surrounding circumstances bear out Wellington's reply: 'I positively deny that this article referred at all to the museums or galleries of pictures.' The conduct of the allies was, however, strongly criticised by Sir Samuel Romilly in the House of Commons on February 20, 1816. He relied particularly upon the contention that many of the acts of restitution were wholly irrational in their effects. Thus Venice when plundered was Italian; in 1816, pursuantly to the Treaty of Campo Formio, she had become Austrian. The answer to this objection is that the restitution was made not to the political authority, but to the locality. Whatever changes may take place in the political circumstances of the kingdom of Greece, every one will desire the preservation in their present position of the remains of the Acropolis.

3. The immunities stated above have been hardly and gradually won, and it would probably be still held that they must give way to real belligerent necessity. In 1870, in the hope of bringing civilian pressure to bear upon the military authorities, the German forces bombarded Strasburg and destroyed the Library, Picture Gallery, and part of the Cathedral. The step perhaps was an extreme one, but behind the velvet scabbard of regulatory convention the presence of the sword is always discernible, and Lord Pauncefote, at the Peace Conference in 1899, was content to qualify the articles dealing with the conduct of war by the

<sup>1</sup> Quoted Halleck, vol. ii. p. 65.

Submarine  
Cables.

reservation, 'Saving the necessities of war,'<sup>1</sup> and, as we have seen, the rules settled by the two Hague Conferences were purposely stated in the form of instructions for the guidance of troops, rather than of positive and obligatory enactment.

4. The question of submarine cables presents special features. It was raised at the Hague Conference of 1899, but without any result: it formed the subject of a series of rules drawn up by the Institute of International Law in 1902: and at the Hague in 1907, one Article was agreed, affecting only such cables in so far as they come within the power of an army occupying enemy territory.

Such a cable may connect two neutral territories. In that case it is beyond doubt inviolable.<sup>2</sup> It may connect the belligerent territories, or two parts of the territory of one belligerent. Equally without doubt it may be cut anywhere except in neutral territorial water.<sup>3</sup> It may connect belligerent with neutral territory. This may, on principle, be cut in the territorial waters, or in the territory, of the belligerent, because, in the words of Professor Westlake 'property durably affixed to the soil must share the fate of the soil.'<sup>4</sup> But the Hague Conference in 1907 made a concession to neutral interests by laying it down that such cables should not be seized or destroyed by an occupying force except in the case of absolute necessity, and that they must be restored, and indemnities for them arranged, at the conclusion of peace.<sup>5</sup> Occupying armies, however, are likely to see an absolute necessity for seizing if not destroying the land ends of such cables whenever they can: and in any case, if the occupation be effective, they will have them under complete control. There is, in fact, no reason on principle why they should not be treated, as they are in this Article, on a par with the land telegraphs of the country.

5. But beyond this, there is the question of the right to cut such cables between neutral and belligerent territory in the

<sup>1</sup> 'This reservation, Sir J. Pauncefoot desired to point out, must be implicitly applied to any and to every code or compact by which it may be attempted to regulate the infinite variety of circumstances and conditions which arise in war' (Memorandum of Sir J. Ardagh to Lord Salisbury, July 5, 1899).

<sup>2</sup> Westlake, *International Law*, Part II. p. 280. Rule 1 of the Institute of International Law (*Annuaire*, vol. xix. p. 331; and set out in Pearce Higgins at p. 271 n).

<sup>3</sup> Westlake, *Ibid.*; Institute of International Law. Rule 2.

<sup>4</sup> Westlake, *International Law*, Part II. p. 281.

<sup>5</sup> Art. 54.



open sea. A strong difference of opinion, which has never been settled, disclosed itself during the discussion of the subject by the Institute of International Law: which passed by a majority the rule that such a cable 'cannot be cut in the open sea unless there is an effective blockade, and subject to the duty of re-establishing it within the shortest possible time.'<sup>1</sup> That it cannot be cut in neutral waters was agreed; and it is extremely doubtful whether even a blockade will be admitted to justify the cutting of it in the open sea. Such an operation may rightly be compared with the sinking of a neutral mail-boat, without visit or search, because it may conceivably be carrying hostile dispatches.<sup>2</sup>

Submarine  
Cables.

6. The rights of an army in occupation of enemy territory were considered in the draft Articles of the Declaration of Brussels and at the Hague Conferences, and a number of rules were agreed upon, some of which have been already dealt with under the heading of 'Appropriable Property.' Territory is considered to be occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territory where such authority is established and in a position to assert itself.<sup>3</sup> In other words, occupation, like blockade, to be valid must be effective: and the old doctrine that it is equivalent to an assumption of complete sovereignty has given place to the doctrine that any rights an invader has, are only a part of his right to do what is necessary to carry the war to a successful conclusion.<sup>4</sup> Under the old practice it was considered permissible to exact from the inhabitants an oath of allegiance, and to press them into the service of the invading army. As to what is meant by the requirement that the occupation must be effective, there cannot but be some doubt,<sup>5</sup> but the new rule may at any rate be taken as an expression of disapproval of the doctrine of 'presumptive occupation' prevalent during the Franco-German war, when Germany claimed to be in occupation of whole cantons, though doing little more than placarding a notice to that effect. The requirement does not mean that every square mile must

Occupation of  
Enemy Terri-  
tory.

<sup>1</sup> Westlake, *International Law*, Part II. p. 281. Rule 3 of the Institute of International Law.

<sup>2</sup> *Ibid.*, p. 282.

<sup>4</sup> Hall, 6th ed. p. 458 *seq.*

<sup>3</sup> Art. 42 of Convention IV. of 1907.

<sup>5</sup> Hall, 6th ed. p. 476 *seq.*



Occupation.

be secured by vedettes, but that, from a military point of view, taking into consideration the nature of the country and the degree of mobility attainable, the control of the occupying force must be reasonably complete and diffusive.

7. The authority of the legitimate power having *de facto* passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure, so far as possible, public order and safety (*l'ordre et la vie publics*) while respecting, unless absolutely prevented, the laws in force in the country.<sup>1</sup> Any compulsion of the population of occupied territory to furnish information about the army of the other belligerent or about his means of defence, is forbidden.<sup>2</sup> Any pressure on the population of occupied territory to take the oath to the hostile power is prohibited.<sup>3</sup> Family honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected. Private property cannot be confiscated.<sup>4</sup> But this prohibition must be taken to be without prejudice to the right to confiscate by way of punishment or under stress of military necessity.<sup>5</sup> Pillage is formally prohibited.<sup>6</sup> If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the state, he shall do it as far as possible in accordance with the rules in existence and the assessment in force, and will, in consequence, be bound to defray the expenses of the administration of the occupied territory on the same scale as that by which the legitimate Government was bound.<sup>7</sup> If besides the taxes mentioned in the preceding Article, the occupant levies other money contributions in the occupied territory, this can only be for the needs of the army or the administration of such territory.<sup>8</sup>

No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.<sup>9</sup>

No contribution shall be collected except under a written

<sup>1</sup> Art. 43.

<sup>2</sup> Art. 44. This article has already been dealt with in its relation to Art. 23. See pp. 129, 131, *supra*.

<sup>3</sup> Art. 45.

<sup>5</sup> Westlake, *International Law*, Part II. pp. 92-3.

<sup>7</sup> Art. 48.

<sup>8</sup> Art. 49.

<sup>4</sup> Art. 46.

<sup>6</sup> Art. 47.

<sup>9</sup> Art. 50.

order and on the responsibility of a Commander-in-Chief. Occupation. This collection shall only take place, as far as possible, in accordance with the rules in existence, and the assessment of taxes in force. For every contribution a receipt shall be given to the payer.<sup>1</sup>

Neither requisitions in kind nor services can be demanded from communes or inhabitants, except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country. These requisitions and services shall only be demanded on the authority of the Commander in the locality occupied. The supplies in kind shall, as far as possible, be paid for in ready-money; if not, their receipt shall be acknowledged and the payment of the amount due shall be made as soon as possible.<sup>2</sup>

The occupying state shall only be regarded as administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile state, and situated in the occupied territory. It must protect the capital of these properties, and administer it according to the rules of usufruct.<sup>3</sup>

These provisions contain a few refinements hardly robust enough to stand the test of practice, but it is not likely that their substance will be seriously violated in future occupations.

8. The chief point to be noted is the distinction maintained between taxes, contributions, fines and requisitions. The right of the occupant to levy the country's taxes is not admitted, though it is assumed that he will probably do so, and these taxes must be used for the expenses of local administration. Anything taken over and above the amount of the existing taxes is described as a 'contribution,' and must be proportionate to the needs of the army if not actually required for administration of the country; in other words, the invaded territory must not be made to pay indefinitely large sums to provide the invader with means for carrying on the war. This, however, is not to affect the power to inflict fines for offences, if the persons fined can reasonably be held responsible for the offence. Finally,

<sup>1</sup> Art. 51.

<sup>2</sup> Art. 52.

<sup>3</sup> Art. 55.



Occupation.

requisitions in kind and services may take the place of contributions, but they must be limited to the necessities of the army of occupation and the resources of the locality; and it would seem to follow that this latter limitation also applies to contributions. The question of payment for these requisitions and services is in effect left to the invader, who will probably decide it on grounds of policy. It cannot be laid down as a rule either of principle or practice that either he, or the Government of the invaded country, is under any liability to pay; and the giving of a receipt is nothing more than a record of the transaction which will furnish a basis of calculation, whatever the ultimate settlement may be.<sup>1</sup>

Ransom.

From this recognition of the right to contributions, requisitions and services, it would logically follow that a 'ransom' can be exacted from a locality as the price of immunity from invasion. On this point the Hague Conventions are silent: but the right seems to be established, though it has been rarely exercised, and presumably the ransom must bear some proportion to the loss which such contributions and the like would inflict upon the district.

Law and Policy.

9. The degree in which the strict rights conferred by military occupation are enforced is determined in practice by political considerations. When the war is one of conquest, it is important to the belligerent that he should not exasperate to desperation a people over whom he aspires to rule peacefully: if, on the other hand, the occupation is certain to be temporary, greater indifference may be expected to the resentment of the inhabitants. The German occupation of France in 1871 was attended by many practices of great severity, and some at least of doubtful legality.

Devastation.

10. It has been much discussed how far a belligerent is entitled to lay waste the territory of his enemy. It need hardly be said that devastation was a familiar incident of mediæval warfare. It was felt, however, at a relatively early period that the practice could only be justified by the strictest military necessity. Thus Evelyn in his *Memoirs*<sup>2</sup> says in 1694: 'Lord Berkely burnt Dieppe and Havre in revenge for the defeat at Brest. This manner of levying

<sup>1</sup> See Westlake, *International Law*, Part II. pp. 96-102.

<sup>2</sup> iii. 335, cited by Hall.

war was begun by the French, and is exceedingly ruinous, <sup>Devastation.</sup> especially falling on the poorer people, and does not seem to tend to make a more speedy end of the war, but rather to exasperate and incite to revenge.' Nearly a century later Vattel speaks with much greater certainty: 'Such acts are awful extremities when a nation is driven to them, barbarous and unspeakable excesses when done without necessity.' It must be observed that even now occasions might easily arise sufficient to excuse devastation. The act of de Vendôme in cutting the dykes and flooding the country from Ghent to Ostend in order to cut Marlborough's communications was clearly within his belligerent rights. The permissibility of a particular act may be determined by reference to two admitted principles which Professor Westlake<sup>1</sup> has well stated for a more general purpose:—

1. Everything is prohibited which is not of a nature to contribute to success in the military operation concerned.
2. Even when a thing does not fall under any absolute prohibition, it may only be done in the circumstances, and in the measure, in which it may reasonably be expected to contribute to the success of the (military operation) concerned.

At the Hague<sup>2</sup> the general prohibition of the destruction of enemy property was qualified by the words 'unless such destruction be imperatively demanded by the necessities of war.'

11. Reprisals and retorsion we have already dealt with in <sup>Reprisals</sup> so far as they are pre-belligerent acts: but they may also be employed by way of punishment for breaches of the rules of war. The only reference to punishment in the Hague Conventions is, as we have seen,<sup>3</sup> in the words 'A belligerent party which violates the provisions of the said regulations, shall, if the case demands, be liable to make compensation'; and as no reference is made to reprisals, we are thrown back upon the general principle which applies to the whole of these regulations that 'in cases not included in the Regulations,

<sup>1</sup> Chapters on the *Principles of International Law*, p. 236.

<sup>2</sup> Art. 23 (G.).

<sup>3</sup> See p. 119, Art. 3 of Convention IV. of 1907.



## Reprisals.

populations and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience."<sup>1</sup>

Reprisals and retorsion, being as a rule the punishment of one man for the offence of another, are justly regarded as only a last resort in cases of absolute necessity.<sup>2</sup> They may be carried out by a breach of the same rule as the offender has broken, or of a different rule:<sup>3</sup> and the punishment must be proportionate to the offence. As Professor Westlake says, they must be justified as punishment only, and not on any such ground as that the breach by one party of the laws of war releases the other from his obligations.

## Hostages.

12. The practice of taking hostages is another point not dealt with in the Hague Conventions, and it cannot therefore be treated as forbidden. They have been in practice seized either to ensure the payment of contributions or the like, or to secure the maintenance of order: and it is agreed in principle that their lives are inviolate, though this did not prevent the Germans in 1870 (and for a short time, the British in South Africa) from putting them on trains, in order to discourage the habit of train wrecking.<sup>4</sup>

## 2. ENEMY PROPERTY ON THE SEA

Capture of  
Merchant  
Vessels.

13. The private property of the enemy taken at sea is generally liable to capture and confiscation. Continental and American writers have long sought to extend the comparative immunities of enemy property on land to this case also. 'Il est à désirer,' said Napoleon, 'qu'un temps vienne, où les mêmes idées libérales s'étendent sur la guerre de mer et que les armées navales de deux puissances puissent se battre sans donner lieu à la confiscation des navires marchands, et sans faire constituer prisonniers de guerre de simples matelots de commerce.'<sup>5</sup> The United States in 1823 urged the adoption

<sup>1</sup> Preamble to Convention II. of 1899, and IV. of 1907.

<sup>2</sup> Hall, 6th ed. p. 411.

<sup>3</sup> Westlake, *International Law*, Part II. pp. 112-115.

<sup>4</sup> Hall, 6th ed. p. 470.

<sup>5</sup> *Mémoires*, iii. c. vi. cited Halleck.

of the principle of exemption, and in 1856 offered to give up privateering if the following provision were added to the Declaration of Paris: 'And the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband.' Austria and Italy acted on this principle during their war in 1866: and Prussia in 1870 announced her intention of adopting it, but finding France unwilling to agree, did not follow up her announcement. It is not seriously pretended that the existing law of nations forbids such capture: but it is claimed that 'the immunity would be universally recognised as another restraining and humanising influence imposed by modern civilisation upon the art of war.'<sup>1</sup> This proposition may be fully admitted without in any way exhausting the controversy. The real question at issue is whether the effect of maritime capture upon the event of hostilities is sufficiently direct and decisive to bring it within the protection of recognised principles. To argue that private property is immune on land and should therefore be immune on the sea, is misleading. Maritime capture is marked by little of the bloodshed and violence which are inseparable from such seizure on land: the objects of capture are almost always directly contributory to the enemy's strength, and, by means of insurance the loss is distributed among the whole community. Any ship may become an instrument of war, if not for actual fighting, at any rate for purposes of transport or invasion. Unlike the owner of property on land, the owner of property on the sea has ventured it, knowing the risk and in the hope of gain: and even in the case of property on land it is inaccurate to say that there is immunity from capture, for in the words of Wheaton<sup>2</sup> :—

'An invader on land can levy contributions or a war indemnity from a vanquished country, he can occupy part of its territory and appropriate its rates and taxes, and by these and other methods he can enfeeble the enemy and terminate the war. But in a maritime

<sup>1</sup> The American Secretary of State to Baron Gerolt in 1870, cited by Hall, 6th ed. p. 438.

<sup>2</sup> Third English edition, p. 484. This passage must now be read subject to the rules on the subject agreed at the Hague, see p. 158, *supra*.



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war, a belligerent has none of these resources, and his main instrument of coercion is crippling the enemy's commerce. If war at sea were to be restricted to the naval forces, a country possessing a powerful fleet would have very little advantage over a country with a small or with no fleet. If the enemy kept his ships of war in port, a powerful fleet, being unable to operate against commerce, would have little or no occupation.'

To which may be added that the confiscation of property on the sea is accompanied and regulated by an inquiry with all the forms of law, such as never takes place in the case of requisitions and contributions on land.

The right of capture may therefore be defended as a means of reducing the enemy and as a measure of military necessity: nor can it reasonably be attacked as inhumane. It is indeed less open to this charge than many other measures the legality of which is undisputed.

Recent History.

14. The recent history of the question has done nothing to throw any doubt upon the right, whatever may have been done in the way of inclining opinion towards an admission of the desirability of a change in the law. The United States, as we have seen, have long been in favour of the change, and the great body of opinion among continental jurists agrees with the American view, which was again put forward at the Hague in 1899. The Conference, however, did not consider itself empowered to deal with the question, and expressed a 'wish' that it be referred to a subsequent Conference.<sup>1</sup> The United States brought the proposal forward again in 1907. Certain alternatives were suggested—sequestration instead of capture, exemption on a certificate from the state that the vessel would not be used as a war ship, and the abolition of the system of prize money—but no agreement was possible, mainly by reason of the opposition of Great Britain, though France, Japan, and Russia were among the states which took the same view. Great Britain was, however, prepared to agree to the total abolition of the right of capturing contraband, but on this no approach to unanimity was possible.<sup>2</sup> The 'wish' of 1899 was replaced by a much vaguer wish 'that the preparation of regulations relative to the laws and customs of naval war

<sup>1</sup> *Von 5* of 1899.

<sup>2</sup> See Part IV., Ch. iv., *infra*.

should figure in the programme of the next Conference, and that in any case the powers may apply, as far as possible, to war by sea the principles of the Convention relative to the laws and customs of war on land.' As private property can hardly be said to be exempt on land, even legislation by analogy would not exempt it on the sea: and some difficulty would be experienced in finding analogies to contributions and requisitions.

15. It is of course a different question and one not properly within the scope of this book, whether the interest of a particular country is best secured by the retention or abolition of the practice. But as the opposition of Great Britain is undoubtedly the great obstacle to a change, it is well worth considering how far this country gains by the existing practice. The main arguments on the one side and the other may be briefly summarised as follows:—In favour of the change it is urged (apart from the argument based on humanity):—

(1) That the pressure which can be put upon a continental enemy by destroying his sea-borne commerce is of comparatively little importance now that the development of railway systems enables him to trade and get his supplies overland, and the Declaration of Paris enables him to ship his goods with safety in neutral vessels, except in the case of contraband, and that this argument will be stronger still if the Declaration of London is ratified and the doctrine of continuous voyage in relation to conditional contraband is abolished (*see* Part IV., Ch. iv., *infra*).

(2) That experience has shown that the loss inflicted even under the present system, while a hardship to private individuals, was so small in proportion to a nation's total over-sea trade as to involve very slight pressure upon that nation as a whole, whereas to Great Britain, if she lost command of the sea, it would probably be fatal.

(3) That Great Britain, depending to an enormous extent upon imported supplies, and earning enormous profits by her carrying trade, would stand to gain in a corresponding degree if those supplies and that trade could remain uninterrupted by the operations of enemy cruisers.<sup>1</sup>

<sup>1</sup> See Sir Robert Reid's letter to the *Times*, October 14, 1905.



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(4) That the effect of capture in bringing pressure to bear which will reduce the enemy to submission is much modified by the system of insurance.

(5) That all neutrals will gain by the freedom from the inconvenience, delay and loss, occasioned by the capture, and, in many cases, destruction of enemy vessels in which their goods are carried.

(6) That the result of the present system would be the transfer to neutral shipowners of the greater part of Great Britain's carrying trade, which once lost would never, or only after a long interval, come back; and

(7) That the proposed immunity would be an important step towards an agreement for the reduction of naval armaments, one of the main justifications put forward for large navies being the defence of the mercantile marine.

Arguments against  
Immunity.

16. Against the proposed change it is urged:—

(1) That exemption leads logically to the abolition of commercial blockade, and that unless such blockade is abolished, there will be constant disputes, resulting in the power which alleges itself to be aggrieved falling back upon the old principle of indiscriminate capture<sup>1</sup>; though this argument will lose some of its strength if the rules of the Declaration of London as to blockade are ratified and honourably observed.<sup>2</sup>

(2) That it is by her navy alone that Great Britain can bring pressure to bear upon a continental enemy; that it is only by capturing or driving from the sea all enemy merchant vessels that such pressure can be made effective, and that by giving up this right, Great Britain, in the words of Lord Palmerston, 'would be inflicting a fatal blow upon her naval power and would be guilty of an act of political suicide.'

(3) That there will be little consolation to a nation whose mercantile marine is paralysed in the fact that it has neutrals to rely upon, and that its supplies can, at great inconvenience and great expense, be brought by train, even if the train service is equal to the task.

(4) That the risk to Great Britain of losing her carrying

<sup>1</sup> See Sir Edward Grey's instructions to the British delegates in 1907, *Parl. Papers*, Misc., No. 1. (1908), p. 15; and Hall, 6th ed. p. 443.

<sup>2</sup> See Part. IV., Ch. v., *infra*.

trade to neutral rivals is comparatively slight : for the British trade is so large that neutrals could not possibly undertake it, and the genuine sale of British ships to neutral buyers on so large a scale would be impossible, even if the validity of such sales were recognised by the enemy, which is doubtful ; and in any case the ships so transferred would be taken in for adjudication, so that the enterprise, to the neutral, would not be worth the trouble and expense, even though he succeeded in establishing the *bona fides* of the transfer.

(5) That the risk to British trade is greatly over-estimated ; the Commission on Food Supply in Time of War in 1905 (Cd. 2643, p. 59) reported that so long as Great Britain retained command of the sea, there was no reasonable probability of a serious interference with her food supplies, though undoubtedly the price would rise : and it is pointed out by opponents of the change that in any event this would probably happen, so long as the doctrines of contraband and blockade are liable to be strained, as they probably would be, by any power in a war against Great Britain : while, if Great Britain lost command of the sea, it is difficult to imagine a victorious enemy standing by and allowing her trade to go on and her food supplies to come in as if nothing had happened. It is true that the rules as to blockade and contraband are fairly definite and generally accepted : but it is necessary to guard not only against operations permitted by, but also against violations of, international law.<sup>1</sup> It is urged, too, that under modern conditions a repetition of the exploits of the *Alabama* is highly improbable : steam war ships cannot remain at sea for the length of time necessary, but must be within a short distance of a coaling station, and are therefore more easy to locate and attack : they cannot with the same facility as sailing ships spare men for prize crews (though they may, without violating any rule of international law, destroy their enemy prizes<sup>2</sup> if they can find room on board for the captured crew) : and their prey, being themselves for the most part steam ships, can, with the assistance of wireless telegraphy, more easily avoid them. Even the *Alabama* with all her advantages—her steam power being assisted by sail—only made prizes at the rate of

<sup>1</sup> See The Report of the Commission on the Supply of Food and Raw Material in Time of War, pp. 25, 26.

<sup>2</sup> See Part. IV., Ch. ix., *infra*.



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three per month: 'and the enormous moral effect which she (and the other Confederate cruisers) caused, would have been comparatively insignificant against a steam trade.'<sup>1</sup>

(6) That while the change would relieve those nations which have only a single coast-line to defend, it would do little to lighten the burden of the naval defence of the British Empire: though against this it must be remembered that it might render unnecessary excessive building against building by other powers.

17. An extreme view taken in certain quarters is that the provision in the Declaration of Paris that the neutral flag covers enemy goods was from the British point of view a mistake, and ought to be repudiated: a proposition which savours of international hooliganism, and is not likely to be seriously entertained in any responsible quarter. It would, among other things, involve the repudiation by all other powers of the rule against privateering and the rule against paper blockade, for the four rules of the Declaration were expressly agreed to be indivisible.

It is obvious, then, that the question of policy is one of serious difficulty, and underlying the opposition to the change there is, unfortunately, but it may be, justifiably, a doubt as to the security that in case of war the new rule of immunity would be observed by an enemy who succeeded in obtaining the command of the sea. In the event of a disaster of that kind, it would probably in practice be found to matter little whether private property were agreed to be exempt from capture or not: and it will be for experts to decide whether the advantages which would accrue from the change before that disaster took place would not be worth having, even though under the strain of extreme necessity the protection afforded by immunity from capture should prove illusory.<sup>2</sup>

Destruction  
of Prizes.

18. The question of the destruction of prizes involves consideration not only of the rights of belligerents but of the rights of neutrals. It was fully dealt with by the Naval

<sup>1</sup> The Report of the Commission on Supply, etc., pp. 28, 29.

<sup>2</sup> See on the subject, Hall, 6th ed. p. 442; Westlake, *International Law*, Part II. p. 129; a useful summary of the arguments for the existing principle in Latifi, *Effects of War on 'Property'*, p. 117; and a paper (published by the Eighty Club) written by the Right Hon. Arthur Cohen, K.C. *Sea Law and Sea Power*, by Mr. T. Gibson Bowles contains a vigorous statement of the case against exemption.

Conference of London in 1908-9, and an examination of it will be more conveniently made in the chapters relating to neutrality, in which the results of that Conference are set out.<sup>1</sup>

Destruction of  
Prizes.

Private property belonging to the enemy and carried in neutral ships is now immune from capture. The conditions of the immunity will be dealt with under the head of neutrality.

Free Ships, Free  
Goods.

19. There are certain other minor exceptions to the rule that enemy property can be seized. The immunity of cartel ships<sup>2</sup> and of hospital ships<sup>3</sup> has already been mentioned. A custom of long standing, which exempted vessels charged with religious, scientific or philanthropic missions, was embodied in Article 4 of Convention XI. of 1907. By Article 3 of the same Convention a similar immunity was granted to vessels exclusively used in coast fisheries, or in 'small local navigation,' as well as to their rigging, tackle and cargo: the exemption ceasing from the moment that they take any part whatever in hostilities. The contracting powers bound themselves not to profit from the harmless character of these vessels by employing them for military uses, while preserving their peaceful appearance. The previous practice with regard to coast fishing-vessels (deep-sea fishers were never regarded as exempt) had been uncertain, Great Britain granting the exemption, as a rule, as a matter of grace, and withholding it when as, in 1800, they were employed by the French as fire vessels and privateers.<sup>4</sup> It may be noted as matter for criticism that no definition of 'coast fisheries' or 'small local navigation' was attempted: and, indeed, a certain vagueness on these points was inevitable.

Minor Exemp-  
tions.

20. More important was the rule laid down with regard to postal correspondence.<sup>5</sup> On the motion of Germany it was agreed that 'the postal correspondence of neutrals or belligerents, whatever its official or private character,'<sup>6</sup> found

Postal Corres-  
pondence.

<sup>1</sup> See Part IV., Ch. ix., *infra*. <sup>2</sup> See p. 152, *supra*. <sup>3</sup> See p. 147, *supra*.

<sup>4</sup> Hall, 6th ed. p. 444, *seq.*; Pearce Higgins, *The Hague Peace Conferences*, p. 403; Westlake, *International Law*, Part II. pp. 133-8.

<sup>5</sup> Convention XI. of 1907, Arts. 1 and 2.

<sup>6</sup> This is the official translation: but the French original is 'quel que soit son caractère officiel ou privé,' which would seem to be more properly translated, 'whatever its character, official or private,' or 'whether its character be official or private.'



Postal Correspondence.

on board a neutral or enemy ship on the high seas is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay.' Correspondence with a blockaded port was excepted: and it was provided that 'the inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of naval war respecting neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible.'<sup>1</sup>

The importance of a punctual and uninterrupted postal service to neutrals and to the non-combatant members of belligerent states has long been recognised as giving to mail boats and their mails a claim to special treatment. The subject comes in the main more properly under the head of 'Unneutral Service':<sup>2</sup> but it is important to note here that the immunity from capture or search generally allowed to mail bags on neutral vessels is extended to those found even on enemy vessels, and it is not even laid down as a condition that the vessel must be a regular mail boat. Probably only regular postal correspondence was intended: it can hardly be supposed that the intention was to exempt official correspondence specially put on board an enemy vessel not accustomed to carrying letters. Such a vessel would probably be held guilty of 'unneutral service.'

21. The privilege granted even to official correspondence is very wide. It is, on the face of it, somewhat remarkable that a belligerent must allow to pass, or (if the ship is detained) actually forward,<sup>3</sup> correspondence to or from his enemy's Government departments. The German delegate in supporting his proposal, argued that it was hardly possible that belligerents, having telegraphs and wireless telegraphy at their disposal, would use the ordinary mails for official military communications: so that the disadvantage to a belligerent of being forbidden to open, examine and delay mail-bags would be

<sup>1</sup> Art. 2.

<sup>2</sup> See Part IV., Ch. vi., *infra*.

<sup>3</sup> He must, it would seem, make his own arrangements for forwarding it: a rule which was violated by the *Smolensk* which, in 1904, took mails out of a German vessel and then stopped a P. & O. vessel, and put them on board her for conveyance to their destination. There can be no right to stop a neutral vessel for any such purpose (see Pearce Higgins, p. 402).

slight, compared with the consequent advantage to neutrals and non-combatants in securing a regular and punctual service. It may be added that owing to the ease with which dispatches may be made to bear the appearance of private letters, or carried by individuals, and any attempt to seize them evaded, the right of seizing them is in practice of little if any value. Great Britain has already treaties with the United States and France protecting the mail steamers of the contracting powers in case of war between them, and, in fact, the immunity was granted during the Spanish-American and the Boer Wars.<sup>1</sup> It is clear, then, that immunity to all mails was intended as being called for by the balance of convenience, for otherwise every mail-bag would be searched: though if a belligerent sends, by one of his own, or a neutral, mail boat, military dispatches which are, on the capture of the vessel (if his own), or its search (if neutral) discovered and seized without any interference with or delay to the vessel's ordinary mails, he will have little, if any, ground for complaint.

Postal Correspondence.

The Conference was not able to exempt from visit and search the mail boats themselves. If of belligerent nationality, they are still liable to capture; if neutral, they are still liable to visit and search, but their liability is reduced to the narrowest possible limits. The Convention (No. XI. of 1907) was ratified on behalf of Great Britain in November 1909.

22. It is often important to determine the ownership of property captured at sea, for its nationality and therefore its liability to capture, is involved therein. Usually in peace the master of the ship is treated as the agent of the consignee, so that the property vests in the consignee on delivery to the master; but the goods may be shipped at the consignor's risk, and in that case the ownership during the voyage remains in him. During or just before war, however, there cannot be the same freedom of contract. Lord Stowell, in the *Packet de Bilbao*<sup>2</sup> (1799), said:—

Changes of Nationality.

‘In times of profound peace, when there is no prospect of approaching war, there would unquestionably be nothing illegal in contracting that the whole risk should fall on the consignor

<sup>1</sup> See Pearce Higgins, p. 401.

<sup>2</sup> 2 C. Rob. 133 (1799).



Changes of  
Nationality.

till the goods came into the possession of the consignee. In time of peace they may divide their risk as they please, and nobody has a right to say they shall not. . . . In time of war this cannot be permitted, for it would at once put an end to all captures at sea: the risk would in all cases be laid on the consignor, when it suited the purpose of protection. . . . (The captor) having all the rights that belong to his enemy, is authorised to have his taking possession considered as equivalent to an actual delivery to his enemy: and the shipper who put it on board during a time of war must be presumed to know the rule.'

The beginning of the voyage is the critical date, whether the enemy is the consignee or the consignor. In the *Josephine*<sup>1</sup> (1801) it was held that silver consigned by an enemy shipper to his agent in Hamburg, for the purpose of meeting drafts of a correspondent in America, without any letter of advice putting it out of his control, must be treated as the property of the shipper. The courts of the captor do not recognise claims against captured vessels or cargoes which would have been effective as against the original owners. In our legal phrase, the goods are acquired free from equities. Thus in the *Marianna*<sup>2</sup> (1805) it was held that a claim cannot in a prize court be founded upon a lien on freight for the payment of the purchase price of a vessel. Similarly, in the *Tobago*,<sup>3</sup> it was held that bottomry<sup>4</sup> on an enemy's ship is not an interest that can support a claim in a prize court on behalf of the bond-holder.

23. Property which has been purchased by a neutral in good faith becomes of course neutral: and save in the case of ships, little difficulty can arise on the point. But with ships the matter is more complicated. Enemy goods are not liable to capture unless found in an enemy vessel: but an enemy vessel is liable to capture in all circumstances. There is, therefore, a strong temptation to the subjects of a belligerent state to make a colourable transfer of their shipping to neutrals during or in contemplation of a war: and against this evasion of the liability to capture it is admitted that belligerents have a right to protect themselves.

<sup>1</sup> 4 C. Rob. 25.

<sup>2</sup> 6 C. Rob. 24.

<sup>3</sup> 5 C. Rob. 218.

<sup>4</sup> 'Bottomry is a species of mortgage or hypothecation of a ship, by which her keel or bottom is pledged (*partem pro toto*) as a security for the repayment of a sum of money.' (Wharton, *Law Lexicon*, § v.).

The old French rule was that any sale of a ship by an enemy subject to a neutral was invalid if made after, and if the buyer could have had knowledge of, the outbreak of war: and this principle was maintained by France in the Memorandum laid by her before the Conference of London,<sup>1</sup> but was then abandoned in favour of rules more in accordance with those followed by Great Britain.

24. Great Britain being more largely interested in ship-building and shipselling has always laid stress upon the argument that the trade in ships is like any other trade; and that the assignment of a ship to a neutral (other than a ship of war<sup>2</sup>) is not in principle invalid merely because it takes place during or in contemplation of a war. In the *Ariel*<sup>3</sup> it was held that 'the sale of a ship, absolutely and *bonâ fide*, by an enemy to a neutral *imminente bello* or even *flagrante bello*, is not illegal,' nor is such a vessel necessarily condemned, even though part of the purchase money remains unpaid. But as Lord Stowell observed in the *Sechs Geschwistern*,<sup>4</sup> the circumstances will be jealously examined:—

'The rule which this country has been content to apply is that property so transferred must be *bonâ fide* and absolutely transferred: that there must be a sale divesting the enemy of all further interest in it: and that anything tending to continue his interest vitiates a contract of this description altogether.'<sup>5</sup>

Such an assignment is, by British decisions, invalid if made in a blockaded port,<sup>6</sup> or in the course of a voyage, before the ship has actually been delivered to the neutral

<sup>1</sup> For details as to this Conference, see Part IV, Ch. iii., *infra*. The rules agreed by it as to transfer of vessels may conveniently be dealt with here. It must, however, be remembered that the Declaration of London is not yet ratified.

<sup>2</sup> *The Baltica*, 11 Moore, P.C. 141 (1857). *The Minerva*, 6 C. Rob. 396 (1807).

<sup>3</sup> 11 Moore, P.C. 119 (1857). Cf. also the *Baltica*, *supra*; in which case, though the vessel was sold *in transitu*, the *transitus* had ceased and the vessel had come into the hands of the purchaser before she was captured. Cf. also the *Benedict*, Spinks, 314, the *Minerva*, 6 C. Rob., 396 (1807).

<sup>4</sup> 4 C. Rob. 100 (1801).

<sup>5</sup> Cited in the *Ariel* (*supra*) at p. 132.

<sup>6</sup> *The General Hamilton*, 6 C. Rob. 62 (1805).



Ownership of  
Ships.

buyer<sup>1</sup>; and the ship is liable to condemnation if there are grounds for suspicion not satisfactorily explained, such, for instance, as the absence of documentary evidence of transfer on board, the retention of control or power of revocation by the transferor, or the like.<sup>2</sup>

25. In the Memoranda presented by the powers at the Conference of London, Russia and Germany took the French view, and the Netherlands were in favour of unrestricted permission to transfer even in the course of a war; while the rest of the powers put forward with variations the British principle, which was the mean between these two extremes. An agreement was, however, reached, which was embodied in the following Articles:—

*'The transfer of an enemy vessel to a neutral flag effected before the outbreak of hostilities is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted. Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid, if it is unconditional, complete and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits arising from the employment of, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages. (Article 55.)*

<sup>1</sup> The *Baltica*, 11 Moore, P.C. 141 (1857); the *Danckebaar Africaan*, 1 C. Rob. 112 (1798); the *Vrouw Margaretha*, 1 C. Rob. 336 (1799); the *Jan Frederick*, 5 C. Rob. 128 (1804).

<sup>2</sup> The *Vigilantia*, 1 C. Rob. 1 (1798); the *Endraught*, 1 C. Rob. 19 (1798); the *Welvaart*, 1 C. Rob. 122 (1799); the *Juffrouw Anna*, 1 C. Rob. 124 (1799); the *Noydt Gedacht*, 2 C. Rob. 137n. (1799); the *Jemmy*, 4 C. Rob. 31 (1801); the *Saglasie*, Spinks, 105; the *Ernst Merck*, Spinks, 99; the *Ariel*, 11 Moore, P.C. 119 (1857); the *Christine*, Spinks, 82.

*The transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void, unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.*

Ownership of  
Ships.

*There however is an absolute presumption that a transfer is void:—*

(1) *If the transfer has been made during a voyage or in a blockaded port.*

(2) *If a right to repurchase or to recover the vessel is reserved to the vendor.*

(3) *If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing, have not been fulfilled. (Article 56.)*

26. The effect of these provisions, which were substantially in accordance with the British contentions, may be summarised as follows:—

The general principle is that a *bona fide* transfer is valid, made either before or after the outbreak of war. *Bona fide* means, not made in order to evade the consequences of a war.

A. In the case of a transfer before the outbreak of war, the onus of proving *mala fides* is on the captor.

i. But a vessel transferred more than thirty days before is irrebuttably presumed to have been transferred *bona fide*, if the transfer was unconditional, complete, legal and without retention of control or profits by the transferor.

ii. A vessel transferred less than thirty days before may, even if the above conditions are satisfied, still be proved by the captor to have been transferred *mala fide*, i.e. in order to evade the consequences of the war.

iii. A vessel transferred less than sixty days before loses the presumption in her favour if she does not carry her bill of sale on board, and must prove her own *bona fides*, in addition to satisfying the above conditions: and in any event is entitled to no damages.



## INTERNATIONAL LAW

B. In the case of a transfer after the outbreak of war,

The onus of proving *bona fides* is upon the vessel.

In three cases the presumption of *mala fides* is irrebuttable:—

*a.* If transfer is made during voyage or in a blockaded port.

*b.* If a right of repurchase or recovery is reserved.

*c.* If the formalities of transfer are not observed.

It is to be noted that an attempt was made to include among the circumstances raising an absolute presumption of invalidity the fact that the vessel after the transfer continued in the same trade and on the same route as before. The attempt, however, was unsuccessful, and this case was intentionally omitted; so that such circumstances, though raising suspicion, will not be held conclusive against the vessel.

27. In connection with this branch of the subject, it is important to consider the rules by which it is to be determined whether goods or ships have an enemy or a neutral character. By the Declaration of Paris the 'neutral flag covers enemy goods, with the exception of contraband of war,' and 'neutral goods, with the exception of contraband of war, are not liable to capture on board an enemy ship.' So far, therefore, as goods are concerned, the question only arises when they are found on board an enemy ship.

The case of ships is comparatively simple, and at the Conference of London the principle was agreed without difficulty and embodied in Article 57:—

*'Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly.'*

*'The case where a neutral vessel is engaged in a trade which is closed in time of peace remains outside the scope of and is in nowise affected by this rule.'*

By the last paragraph of this Article all questions con-

nected with the Rule of the war of 1756,<sup>1</sup> which we deal with elsewhere, were expressly reserved, there being no unanimity on the subject at the Conference: and the result of the first paragraph is to establish a simple rule that a vessel's nationality is determined by the flag she is entitled to fly under the municipal laws of the country whose flag it is, but that such flag will not protect her if she has violated the rules against transfer to a neutral flag which are contained in Articles 55 and 56.<sup>2</sup> It has been suggested that a vessel might be treated as an enemy vessel if owned wholly or in part by an enemy: but the suggestion<sup>3</sup> involves the absurdity that the vessel might thereby be an enemy vessel, if one sixty-fourth part of her were owned by an enemy subject, whereas she would be neutral if owned by a neutral company whose shareholders were largely enemy subjects.

28. In the case of merchandise more difficulty arises. The British courts had held that the determining factor was the domicile of the owner, domicile being established by proof of such circumstances as show an intention to make a place the place of residence for an indefinite period.<sup>4</sup> There were certain subsidiary rules applied: a commercial enemy domicile, for instance, was held to be established if the transactions in question originated in a house of trade established in an enemy country, but only in respect of those transactions,<sup>5</sup> and such commercial domicile could be terminated by a *bona fide* abandonment;<sup>6</sup> and where one of two partners had an enemy domicile, his share only of the partnership property was held to be enemy property.<sup>7</sup> A neutral might be held, too, to have an enemy domicile if the circumstances were such that his association in trade with the enemy was exceptionally close: if, for instance, he traded under a concession or monopoly granted by the enemy.<sup>8</sup> To this principle of domicile must be added the further rules of the British

<sup>1</sup> See Part IV., Ch. ii., *infra*.

<sup>2</sup> See p. 174.

<sup>3</sup> See the instructions to the British delegates at the Conference of London, par (h).

<sup>4</sup> The *Harmony*, 2 C. Rob. 322 (1800); the *Postilion*, Hay and Marriott, 245.

<sup>5</sup> The *Jonge Klassina*, 5 C. Rob. 297 at p. 302 (1804); the *Portland*, 3 C. Rob. 43 (1800).

<sup>6</sup> The *Indian Chief*, 3 C. Rob. 12 (1801).

<sup>7</sup> The *Citto*, 3 C. Rob. 38 (1800); the *Harmony*, 2 C. Rob. 322 (1800).

<sup>8</sup> The *Freundschaft*, 4 Wheaton, 105; the *Anna Catharina*, 4 C. Rob. at p. 119 (1802).



Enemy Character of Goods. Courts, that the produce of land in the enemy territory is enemy property, though the owner of the land may be a neutral.<sup>1</sup>

29. In relation to the above cases, a question sometimes arises as to the nationality of territory occupied by a belligerent during a war. The general rule which has been followed in the English cases is that mere military occupation does not change the character of a place: before this can happen it should, 'either by cession or conquest or some other means . . . either permanently or temporarily be incorporated with and form part of the dominions of the invader.'<sup>2</sup> But there are degrees in the nature of an occupation. In the case of the *Gerasimo*, Moldavia was a neutral country occupied by Russia, expressly and avowedly, for purely temporary purposes: while the American Court, when the island of Santa Cruz was captured by the British, treated it as having thereby become British,<sup>3</sup> as an acquisition not necessarily permanent, but for all belligerent and commercial purposes part of the domain of the captor.

The principle of domicile was also adopted by the United States, Spain, the Netherlands, and Japan: but in accordance with their traditional policy Germany, Austria, France,<sup>4</sup> Italy, and Russia insisted at the Conference of London on the principle of nationality, and no agreement could be reached. The rules laid down on the subject of the enemy or neutral character of goods suffer therefore from this important defect that, while the character of the goods is said to be determined by the character of the owner, no assistance is given in determining the character of the owner.

*'The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner' (Article 58).*

<sup>1</sup> The *Phoenix*, 5 C. Rob. 20 (1803); the *Vrow Anna Catharina*, 5 C. Rob. 161 at p. 167 (1804).

<sup>2</sup> The *Gerasimo* (1857), 11 Moore, P.C. 88 at p. 96; Westlake, *International Law*, Part II. p. 146.

<sup>3</sup> *Thirty Hogsheads of Sugar (Bentzon claimant) v. Boyle*, 9, Cranch, pp. 191, 195; Westlake, *International Law*, Part II. p. 146; Hall, 6th ed. p. 502.

<sup>4</sup> France, in 1870, in her instructions to naval commanders seemed to admit the principle of commercial domicile where goods were concerned: but her Courts did not modify their policy accordingly; Westlake, *International Law*, Part II. pp. 140, 141.

*'In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods' (Article 59).* Enemy Character of Goods.

The principle which will be adopted by the International prize court is therefore left in doubt: but, as the division of opinion on the Conference was so equal, it is not impossible that the principle of domicile will be accepted, though much will depend on the constitution of the court at any given time. If the principle of nationality is adopted, it is a matter of speculation whether or not it will involve the disappearance of the British rule that the produce of enemy soil is enemy though the owner of the soil be neutral: while the rules as to commercial domicile will certainly be abrogated, being in direct conflict with French decisions.<sup>1</sup>

The British Government, while advocating the principle of domicile, did not regard it as of vital importance, and in the course of the discussion were prepared to accept that of nationality, with the object of attaining to certainty on the question: but this concession did not enable the Conference to arrive at any unanimous decision.

30. By Article 60 of the Declaration it was provided that:— Transfer in transitu.

*'Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded.'*

*'If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognised legal right to recover the goods, they regain their neutral character.'*

This is a provision essential to belligerents, owing to the ease with which all enemy goods on the sea at the time of the outbreak of war could be at once transferred to neutrals: and is necessary in the case of those systems of municipal law such as the English,<sup>2</sup> according to which the mere contract may operate as a transfer of the property. The British prize courts would not recognise transfer *in transitu* either

<sup>1</sup> Pist. et Duv. I. 321; Barboux, *Jurisprudence*, p. 120.

<sup>2</sup> Cf. the Sale of Goods, Act 1893, sect. 17.



Transfer *in*  
*transitu*.

during or in contemplation of war:<sup>1</sup> for but for this prohibition 'all goods shipped in the enemy's country would be protected by transfers which it would be impossible to detect.'<sup>2</sup> It will be noted, however, that the right of stoppage *in transitu* in the case of the bankruptcy of the buyer is expressly safeguarded.

Ransom Bills.

A captured vessel may buy her freedom on the terms of a 'ransom bill,' which protects her from further capture: the due payment of the ransom being enforced by taking a hostage who must (according to the British practice), in order to obtain his liberty, compel the owners to perform the terms of the bill. It is questionable whether the captor, being an enemy, has a direct right of action on the bill. In Great Britain the practice of ransoming may be forbidden by Order in Council.<sup>3</sup>

<sup>1</sup> The *Jan Frederick*, 5 C. Rob. 133 (1804).

<sup>2</sup> The *Vrouw Margaretha*, 1 C. Rob. at p. 338 (1799); Hall, 6th ed. p. 500; Westlake, *International Law*, Part II. p. 151.

<sup>3</sup> Naval Prize Act, 1864, s. 45; see Westlake, *International Law*, Part II. p. 158; Hall, 6th ed. p. 455. By the Naval Prize Bill (sec. 40) (in the main a consolidating bill) now before Parliament, power to prohibit or allow ransoming by Order in Council is retained.

## CHAPTER IV

### POSTLIMINIUM AND CONCLUSION OF WAR

#### I. POSTLIMINIUM

1. IN Roman law the right of postliminium was the right which could be alleged by escaped prisoners entitling them to resume their legal status, as if they had never been away from home. 'Postliminium fingit eum qui captus est in civitate semper fuisse.'<sup>1</sup> The imposing title, and indeed the fiction itself, are hardly required in international law to express the fact that the rights of an owner are suspended, not destroyed, by occupation or capture, and revive when the suspending circumstance ceases to be operative. If a ship has been captured and is recaptured, postliminium, subject to the obligation to pay salvage, comes to the aid of the original owner. The Roman doctrine has bequeathed to the law of nations little beyond the *damnosa hereditas* of a pretentious title; the re-entry into rights of ownership does not depend upon the fiction that they have never been interrupted, for it is conditioned upon a recognition of liabilities legally contracted by the other belligerent during the period of interruption. The modern doctrine has no application except during hostilities, for every treaty of peace, unless the contrary is explicitly stated, is tacitly based on the principle of *uti possidetis*.<sup>2</sup> Private property upon land not being a proper subject for capture, postliminium is generally limited in its effect to the national territory and to captured vessels. A controversy which arose in 1871 illustrates the meaning of the doctrine. During the Prussian occupation of France, the Prussian Government entered into contracts with certain persons for the sale of some public French forests. The price was paid by the purchasers in advance. When the

Origin of  
Term.

<sup>1</sup> Postliminium depends upon the fiction that a prisoner has never left his own state.

<sup>2</sup> Keeping what one has.



## Postliminium.

Prussian occupation ceased, they claimed to be entitled to finish cutting down the trees for which they had already paid. This view was not accepted by the French authorities, and was negated by an additional Article in the Treaty of Peace in December 1871. The French rights revived by postliminium the moment the Prussian occupation came to an end. France was bound by all executed contracts, and generally by the status *in quo*, but in view of the revival of her sovereignty, was not bound to acquiesce in acts which amounted to an executory derogation therefrom, and were, in addition, acts of 'waste,' which violated the now accepted principle that an occupying state must act as the usufructuary only of the forests of occupied territory.<sup>1</sup>

## Salvage.

2. When captured ships are recaptured by the owner's fellow-countrymen or allies, they are not held by the recaptor as original prize, but revert to the prior owner, subject to his obligation to pay salvage. This subject is strictly municipal in its character, except in so far as the rights of allies and neutrals may be concerned, but a brief explanation of the principles and rules of salvage may be usefully added to this chapter. Bynkershoek quotes the old *Consolato del Mare*, the earliest of mediæval maritime codes, to the effect that restitution was only due, if the ship was recaptured before removal to a safe place (*infra præsidia*); if, on the other hand, it had been so removed, since the plenary ownership had passed to the enemy, recapture absolutely transferred both ship and cargo to the recaptor. According to the ancient laws of both England,<sup>2</sup> Scotland,<sup>3</sup> and France,<sup>4</sup> the same practice obtained, and the title of the original owner was obliterated. An English Ordinance of 1649, issuing from the Long Parliament, directed restitution of recaptured vessels to British subjects upon payment of salvage, without regard to intervening dealings other than adoption into the public service of the captors, a principle which was also adopted in naval prize acts in 1786 and 1864.<sup>5</sup> The *Consolato del Mare*, as we have mentioned, required that the recapture

<sup>1</sup> See p. 159, *supra*. <sup>2</sup> See Crompton, *Court d'Admiraltie d'Angleterre*, p. 91.

<sup>3</sup> Lord Stair's *Decisions*, vol. ii. p. 507.

<sup>4</sup> Valin, lib. iii. tit. 9, art. 8.

<sup>5</sup> See Sir W. Scott's judgment in the *Ceylon*; 1 Dodson Admiralty at pp. 117, 118, see also Westlake, *International Law*, Part II., pp. 156, 157. The new Naval Prize Bill adopts the same principle (sec. 30).

should take place before the vessel had been removed to 'a Salvage, safe place,' a requisition sometimes known as the *infra præsidia* rule; other authorities adopted a time limit of twenty-four hours, in order to extinguish the owner's title, a test spoken of by Valin<sup>1</sup> as the common law of Europe. A very interesting judgment of Lord Mansfield's in *Goss v. Withers*,<sup>2</sup> suggests that neither of these tests was ever accepted in the English prize courts:—

'I have taken the trouble to inform myself of the practice of the Court of Admiralty in England before any Act of Parliament commanded restitution, or fixed the rate of salvage: and I have talked with Sir George Lee, who has examined the books of the Court of Admiralty, and informs me that they held the property not changed, so as to bar the owner, in favour of a vendee or recaptor, till there had been a sentence of condemnation; and that, in the reign of King Charles II., Sir Richard Floyd gave a solemn judgment upon the point, and decreed restitution of a ship retaken by a privateer, after she had been fourteen weeks in the enemy's possession, because she had not been condemned.'

3. The judgment of Sir W. Scott in the *Flad Oyen*<sup>3</sup> was to the same effect, and, so far as British prize courts are concerned, the rule may be clearly stated that no neutral may safely buy a British vessel in the enemy's hands until it has been formally condemned in a competent court. As between British subjects not even condemnation can extinguish the title of the original owner in the event of recapture; his ownership revives by virtue of postliminium in every case except when his ship has been converted into a public vessel of the capturing power. The amount of salvage payable varies in different countries. In England the ordinary rule is one-eighth of the ship's value<sup>4</sup>; in the United States one-eighth, if the recapture was due to a public ship, one-sixth if to a privateer. French law directs restitution on payment of one-thirtieth of the value in case of recapture by a public vessel, if such recapture takes place within twenty-four hours of the original seizure; after that period the proportion payable rises to one-tenth. In

<sup>1</sup> Valin, *sur l'ordonnance*, lib. iii. tit. 9, art. 8.

<sup>2</sup> 2 Burr, 694.

<sup>3</sup> 1 C. Rob. 135 (1799).

<sup>4</sup> Cf. the new Naval Prize Bill (sec. 30). As much as one-fourth may be awarded if the recapture is made in circumstances of special difficulty or danger.



Salvage.

Denmark the amount claimable from the original owner is one-third, in Sweden one-half, in Spain and Portugal one-eighth.

## 2. CONCLUSION OF WAR

Treaties of Peace.

4. In theory there is no reason why a war should not be brought to an end by the mere cessation of hostilities without any formal agreement. Such was the end in 1716 of the war between Sweden and Poland, and the Spanish colonial campaign in 1824 perished in the same way from inanition. It is, however, the almost invariable practice to restore a state of peace and determine its conditions by an armistice followed by a formal treaty of peace. The effect of such a treaty is entirely to extinguish the subject of dispute between the contracting parties. In practice a specific renunciation of the object in controversy is frequently required from the defeated party; but whether it be particularly inserted or not, the text-books lay down the academic proposition that recourse to arms is not again permissible for the same object. A treaty of peace will naturally provide for the settlement of outstanding territorial disputes between the signatory parties, but on all points where it is silent the principle of *uti possidetis* comes into play. Consistently with that principle, except in so far as the treaty itself contains other provisions, both parties keep what they hold when the instrument is drawn up.

Their Effects.

5. The restoration of peace revives all private rights between the subjects of the belligerents in so far as they have been suspended but not entirely abrogated by the war:<sup>1</sup> further, it makes ransom bills and the contracts of prisoners of war immediately actionable.

The operation of a treaty of peace commences at the moment of signature unless, of course, it is otherwise expressly agreed, and nice questions have arisen as to the responsibility of subjects for belligerent acts done after the treaty has been signed, but before they are affected with notice of its conclusion. For such intermediate acts it is now agreed that there is no criminal liability. On the question

<sup>1</sup> See p. 111 *supra*.

of civil liability Lord Stowell expressed the reasonable view in the *Mentor*:<sup>1</sup>—

Effects of Treaties  
of Peace.

'I incline to assent to Dr. Lawrence's position, that if an act of mischief was done by the king's officers, through ignorance, in a place where no act of hostility ought to have been exercised, it does not necessarily follow that mere ignorance of that fact would protect the officers from civil responsibility. . . . If the officer acted through ignorance, his own government must protect him; for it is the duty of Governments, if they put a certain district within the king's peace, to take care that due notice shall be given to those persons by whose conduct that peace is to be maintained; and if no such notice has been given, nor due diligence used to give it, and a breach of the peace is committed through those persons, they are to be borne harmless at the expense of the Government whose duty it was to have given that notice.'

Questions have arisen, too, as to the nature of the notice which imposes upon a commander the obligation to cease from hostilities, and it is reasonable that he should be affected only with notice from his own Government. On this principle the French Court condemned as good prize the *Swineherd*, captured by a vessel which had received no official notification, though it had almost certain knowledge, of the conclusion of peace.<sup>2</sup> It is true that in this case the time fixed by the treaty of peace for the suspension of hostilities in the area affected had not expired: but the case was undoubtedly an instance of hardship caused by the strict application of the rule.

In every treaty of peace is implied, or expressly set forth, an indemnity clause extinguishing all claims for damage done in war, or springing from warlike operations. 'I will not take upon myself to say,' said Lord Stowell,<sup>3</sup> 'that a treaty of peace puts an end to all questions of property between the subjects of the states entering into the treaty; perhaps it may be more strictly correct to say that it quiets all titles of possession arising out of the war only. At the same time, when a treaty of peace has been concluded, the revival of any grievances arising before the war comes with a very ill grace, and is by no means to be encouraged.'

6. Conquest is the permanent absorption of all or part of Conquest.

<sup>1</sup> 1 C. Rob. at p. 182 (1799).

<sup>2</sup> Hall, 6th ed. p. 556.

<sup>3</sup> In the *Molly*, 1 Dodson 395.



## Conquest.

the territory of a defeated enemy. A title resting upon conquest is not complete until the conqueror has satisfied two requirements. In the first place, he must possess the material strength to make his conquest good, and in the second, he must have, and exhibit, the intention of appropriation. The rights of an occupier naturally fall far short of those conceded to conquest, and it is sometimes difficult to determine when the one has definitively passed into the other. The leading case on this point is known as the case of Hesse Cassel. In 1806 the Elector of Hesse Cassel was driven from his electorate by Napoleon, and remained excluded for eight years. For a year after his expulsion Napoleon governed Hesse Cassel under military law, and then incorporated it in the kingdom of Westphalia. Jerome Bonaparte was placed on the throne of this newly created kingdom, and his succession was recognised by the treaties of Tilsit and Schönbrunn. Prior to his expulsion the Elector had lent money on mortgage to one Count Hahn Hahn; the latter had received a discharge in full from Napoleon on payment of part of the money advanced. On his return the Elector instituted proceedings against the estate of his debtor, who had died in the meantime, thus raising the whole question of the validity of Napoleon's acts. If Napoleon had effected a definitive conquest of Hesse Cassel, the acts sought to be set aside were well within his legal rights. The Elector had joined the Prussian forces, and was therefore in arms against the lawfully constituted authorities of his country. This circumstance justified confiscation of his private property within the dominion, while the conqueror succeeded to all public property by a species of universal succession. The question was therefore one of fact, and was carried from the Mecklenburg court to the Universities of Kiel and Breslau, and thence by way of appeal to a further University. This ultimate tribunal declined to recognise the Elector's claim on the grounds that Napoleon's conquest had been definitive, that the Elector had been treated by the treaties of Tilsit and Schönbrunn as 'politically extinct,' and that his restoration was not a continuation of his former rule, but a government beginning *de novo*, and inheriting only what was left by its legal predecessor.

7. When a state absorbs by conquest a part or the whole of another state, its position with regard to the liabilities of the conquered state is a matter of some difficulty. From the opinions expressed by writers on international law, it is possible to draw up a few general rules, which no doubt afford some guidance as to what in equity ought to be done; but international practice on the subject hardly provides anything which can be called a rule of law. It may be laid down roughly, in the first place, that the conqueror succeeds to all the assets of a ceded or conquered territory. From the maxims 'Res transit cum suo onere' and 'Nemo plus iuris transferre potest quam ipse habet,' it would naturally follow that such assets must be taken subject to the liabilities attached to them: and we consequently find it stated that a ceded province is taken by the conqueror subject to the debts charged upon it or upon its resources.<sup>1</sup> It is also suggested that in such case the conqueror ought to take over a proportionate part of the general liabilities of the conquered state; and there are a few instances in which such liability has been taken over, but only by virtue of special conventions which negative the existence of any obligation apart from convention.<sup>2</sup> As when a conquered state is wholly absorbed all its liabilities must be said to be charged upon its resources, it would follow, logically, that the conqueror takes the territory subject to such liabilities; and this is the view of Hall<sup>3</sup> and Westlake,<sup>4</sup> the latter suggesting that the liability must be limited to the value of the assets received, if and in so far as such limitation is practicable; but he is of opinion that 'there seems no reason why the general debt of an extinguished state should fare better, in point of the future security for it, than the local debt of a transferred province.'<sup>5</sup> To these authorities may be added the dictum of James, V.C., in *U.S.A. v. M'Rae* (1869):<sup>6</sup> 'I apprehend it to be the clear, public, universal law that any

Effects of Con-  
quest upon Lia-  
bilities.

<sup>1</sup> Cf. Hall, *International Law*, 6th ed., pp. 92, 98; Westlake, *International Law*, Part I. p. 62; Oppenheim, *International Law*, vol. i. pp. 124, 272; Phillimore, vol. i (2nd ed.), p. 336; Rivier, *Principes du Droit des Gens*, vol. i. p. 70; and cf. an article in the *Law Quarterly Review*, vol. xvii. p. 392, by Professor Westlake.

<sup>2</sup> Hall, 6th ed. p. 98n.

<sup>3</sup> *International Law*, Part I. p. 75.

<sup>4</sup> L.R. 8 Eq. at p. 75.

<sup>5</sup> 6th ed. p. 99.

<sup>6</sup> *Ibid.*, p. 77.



Effects of Con-  
quest upon Lia-  
bilities.

Government which *de facto* succeeds to any other Government—whether by revolution or restoration, conquest or reconquest, succeeds to all the public property . . . and to all rights in respect of the public property of the displaced power. . . . But this right . . . can only be enforced in the same way and to the same extent, and subject to the same correlative obligations and rights, as if that authority had not been suppressed and displaced, and was itself seeking to enforce it.<sup>1</sup>

8. But it is generally admitted, by way of exception to the general rule, that the conqueror cannot be held liable for debts incurred by the conquered state for the purpose of carrying on the war, for no state can be assumed to undertake responsibility for acts directed against itself: nor is the reasonableness of the rule itself entirely free from doubt, for, as was pointed out by the Lord Chief Justice in *West Rand Central Gold Mining Company v. The King*: 'A country has issued obligations to such an amount as wholly to destroy the national credit, and the war, which ends in annexation of the country by another power, may have been brought about by the very state of insolvency to which the country has been reduced by its own misconduct. Can any valid reason be suggested why the country which has made war and succeeded should take upon itself the liability to pay out of its own resources the debts of the insolvent state?'

9. In the history of international relations there is little to be found which affords any guidance on the question. By agreement, as we have mentioned, a part of the general debt of the conquered state has sometimes been taken over; and the United States have, in the course of negotiations, more than once insisted that the conqueror takes the place of the conquered and is subject to his liabilities.<sup>2</sup> Their conduct was perhaps consistent with this attitude when, on absorbing Texas (1845), they specifically disclaimed any general liability thereby, it may be, admitting liability in default of a specific disclaimer;<sup>3</sup> and when, in 1898, they gave as a reason for refusing to undertake the debts of Cuba the fact that they did not intend to incorporate the island.<sup>4</sup>

<sup>1</sup> 1905, 2 K.B. at p. 403.

<sup>2</sup> Cf. Westlake, *International Law*, Part I. pp. 62, 63, 75.

<sup>3</sup> *Ibid.*, p. 77.

<sup>4</sup> Wheaton (edited by Atlay), p. 47.

The Italian Courts in 1877 laid it down that in the case of the cession of a part of a state's territory, the transferee is liable to debts contracted in relation to the ceded territory;<sup>1</sup> and there is authority to be found in English cases for the same proposition.<sup>2</sup> But whether the doctrine can be described as a rule of international law or not, it will clearly not be held to be a rule of such clearness and general acceptance as to be entitled to recognition in an English municipal court at the present day. Halleck points out that there may be rights recognised in international law which nevertheless require legislation to bring them under the protection of the municipal law: 'a refusal to pass the necessary remedial acts . . . would be a violation of the obligations imposed by the law of nations,'<sup>3</sup> but the remedy can only be enforced by diplomacy. This is the explanation of the cases of *Cook v. Sprigg*<sup>4</sup> and *The West Rand Central Gold Mining Company v. The King*.<sup>5</sup> In the former case the distinction is clearly drawn: 'According to the well-known rules of international law, a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation.' In the latter case this 'well-known rule' had, in the judgment of the court, become no rule at all; for not only did the court decide that a municipal court has not authority to enforce such a rule, unless directed by legislation so to do, but that there was no principle of international law rendering the conqueror liable to the debts of the conquered incurred before the war. Guided in the main by the former of these two cases, the Commissioners who, in 1900 and 1901, inquired into the concessions granted by the Transvaal Government before the Boer War, declared that 'it is clear that a state which has annexed another is not legally bound by any contracts made by the state which has ceased to exist, and that no court of law has jurisdiction to enforce such contracts if the annexing state refuses to recognise them,'<sup>6</sup> a dictum which, while undeniably correct in its statement of the position of an English court, can hardly

Effects of Con-  
quest upon Lia-  
bilities.

<sup>1</sup> Westlake, *International Law*, Part I. p. 80.

<sup>2</sup> *eg.* *United States v. M'Rae*, L.R. 8 Eq., at p. 75.

<sup>3</sup> Halleck, 4th ed. vol. ii. p. 529.

<sup>4</sup> 1899, A.C. 572, 578.

<sup>5</sup> 1905, 2 K.B., p. 391.

<sup>6</sup> *Parl. Papers*, 1901, Cd. 623, p. 7.



Effects of Con-  
quest upon  
Persons.

be said to be of much authority when the question arises, in an international dispute, whether the annexing state was right or wrong in its refusal.

10. The complete conquest of a country has the effect legally of converting the inhabitants of the conquered country into citizens of the conqueror's state, unless, perhaps, they leave the conquered territory or, being out of it, remain out of it except for a temporary purpose.<sup>1</sup> Where a country cedes a portion of its territory to a conqueror, the position is somewhat different, for in that case the cession is an act of the ceding state, by which its subjects are presumptively bound;<sup>2</sup> but it is usual to stipulate that the inhabitants of the portion ceded shall be at liberty to retain their nationality of origin on condition that they leave the territory ceded. But it is not settled beyond question, either in the case of conquest or of cession, that the subject has the right, by leaving the country, of retaining his old nationality: and in the American case of *United States v. Repentigny*,<sup>3</sup> it was laid down by Mr. Justice Nelson on behalf of the Court:—

(1) That on a conquest by one nation of another, and the subsequent surrender of the soil and change of sovereignty, those of the former inhabitants who do not remain and become citizens of the victorious sovereign, deprive themselves of protection and security to their property, except so far as it may be secured by treaty.

(2) When on such a conquest it was provided by treaty that the former inhabitants, who wished to adhere in allegiance to their vanquished sovereign, might sell their property, provided they sold it to a certain class of persons and within a time named, the property, if not so sold, became abandoned to the conqueror.

<sup>1</sup> Westlake, *International Law*, Part I. p. 70.

<sup>2</sup> Hall, 6th ed. p. 566.

<sup>3</sup> 5 Wallace, 211.

## PART IV

### THE RIGHTS AND DUTIES OF NEUTRAL POWERS

#### CHAPTER I

##### GENERAL PRINCIPLES OF NEUTRALITY BETWEEN STATE AND STATE

1. THE law of neutrality differs from other branches of international law in the comparative certainty with which its rules may be stated. The outbreak of every war affords occasion for the exercise of neutral duties and the concession of neutral rights; belligerents are, as a rule, unwilling to add to their complications by the commission of acts which as between themselves and neutrals are of doubtful legality, and the decisions of their prize courts have, on the whole, been successful in evolving a body of harmonious and intelligible doctrine.

The Hague Conference of 1899 drew up four Articles on two points relating to the position of neutrals, the internment of belligerents and the care of the wounded in neutral countries:<sup>1</sup> and expressed a 'wish'<sup>2</sup> that the question of the rights and duties of neutrals should be inserted in the programme of a future Conference. In 1907 the subject was considered at greater length, and two Conventions<sup>3</sup> were, with certain reservations, agreed upon, limited in their scope and confined for the most part to the statement of hitherto accepted principles. Convention V. dealt with warfare on land, and Convention XIII. with warfare at sea. Neither of these Conventions has been yet ratified by Great Britain.

2. The development of opinion has tended to impose <sup>Supply of</sup> stricter obligations upon neutral powers than were at one time <sup>Troops.</sup>

<sup>1</sup> Arts. 57-60 of the Annex to Convention II. of 1899.

<sup>2</sup> *Vou* 2 of 1899.

<sup>3</sup> Convention V. and XIII. of 1907.



Supply of  
Troops.

required. It has long been admitted that a neutral is obliged to exhibit impartiality between belligerents, and that the latter are correlatively bound to abstain, in deference to the sovereignty of the neutral, from making any military use of his territory or his territorial waters. In the words of Convention V. of 1907 above referred to, 'the territory of neutral powers is inviolable,'<sup>1</sup> and 'belligerents are forbidden to move across the territory of a neutral power troops or convoys, either of munitions of war or supplies'<sup>2</sup>; and neutrals are bound to see that this rule is obeyed.<sup>3</sup> The corresponding provisions of Conventions XIII. in relation to naval war are 'belligerents are bound to respect the sovereign rights of neutral powers, and to abstain in neutral territory or neutral waters from any act which would, if knowingly permitted by any power, constitute a violation of neutrality.'<sup>4</sup> Any act of hostility, including therein capture and the exercise of the right of search, committed by belligerent warships in the territorial waters of a neutral power, constitutes a violation of neutrality and is strictly forbidden.<sup>5</sup> And the setting up of a prize court in neutral territory, or on a vessel in neutral waters, is a violation of neutrality.<sup>6</sup>

3. Earlier usage, however, was content with a standard of impartiality which fell far short of later requirements. It was common for neutrals to supply troops to one of two belligerents, under a previous treaty, nor was the practice held to involve any deviation from neutrality. A treaty of 1781 bound Denmark to supply certain troops to Russia in the event of war. In 1788 war broke out between Russia and Sweden. Pursuantly to the provisions of the treaty, Denmark furnished the contingent promised, and defended her conduct in so doing by a declaration sent to Sweden. It ran as follows:—

'His Danish Majesty has ordered the undersigned to declare that, although he complies with the treaty between the courts of Petersburg and Copenhagen in furnishing the former with the number of ships and troops stipulated by several treaties, and particularly that of 1781, he yet considers himself in perfect amity and peace with his Swedish Majesty; which friendship shall not be interrupted, although the Swedish arms should prove victorious,

<sup>1</sup> Art. 1.

<sup>4</sup> Art. 1 of Convention XIII.

<sup>2</sup> Art. 2.

<sup>5</sup> Art. 2.

<sup>3</sup> Art. 5.

<sup>6</sup> Art. 4.

either in repulsing, defeating, or taking prisoners, the Danish troops now in the Swedish territories, acting as Russian auxiliaries, under Russian flags. Nor does he conceive that his Swedish Majesty has the least ground to complain, so long as the Danish ships and troops now acting against Sweden do not exceed the number stipulated by treaty; and it is his earnest desire that all friendly and commercial intercourse between the two nations, and the good understanding between the courts of Stockholm and Copenhagen, remain inviolably as heretofore.<sup>1</sup>

Supply of  
Troops.

The Swedish representative agreed to the proposal on grounds which were carefully stated to be merely politic, and added that the Danish contention 'is a doctrine which his Swedish Majesty cannot altogether reconcile with the law of nations and rights of sovereigns, and against which his Majesty has ordered (Baron de Sprengtporten) to protest.'<sup>2</sup> The objection of Sweden was not to the lending of aid to Russia (that this was permissible owing to the treaty, so long as the Danish forces remained in Russian territory, was admitted), but to the invasion of Sweden by the Danish troops: and this objection, with the like reservation, was in effect supported by Great Britain and Prussia. The justification of similar action by reference to a prior treaty was admitted by Great Britain in 1803 and 1804, and that nation acted on the same principle in 1826.<sup>3</sup> This is believed to supply the last occasion on which such assistance has been given by a neutral, and the practice may now be confidently pronounced extinct. The rendering of military aid by A to B, while the latter is at war with C, is essentially an unneutral act, and it is no answer to C's complaint that A was under contract to commit the act of illegality. Such an injury to C constitutes a *casus belli*, and the fact that it may be impolitic so to treat it is without bearing upon the legal question.

4. At the Hague in 1907 no specific prohibition of the supply of troops in land warfare was enacted: but in relation to naval warfare it was agreed that 'the supply, in any manner, directly or indirectly, of warships, supplies, or war material of any kind whatever, by a neutral power to a belligerent power, is forbidden:<sup>4</sup> though 'a neutral power is not

<sup>1</sup> Cited by Phillimore.

<sup>2</sup> *Annual Register* (1788), vol. xxx. pp. 292, 293.

<sup>3</sup> Westlake, *International Law*, Part II. p. 178.

<sup>4</sup> Art. 6 of Convention XIII.



Supply of  
Troops.

bound to prevent the export or transit, for either belligerent, of arms, munitions of war, or, in general, of anything which could be of use to an army or fleet.<sup>1</sup>

Neutral Money  
Loans.

5. It would be clearly a violation of neutrality for a neutral state to make a money loan to a belligerent, but the question is more open to doubt in cases where the loan issues from neutral individuals. Money is an ordinary commodity of trade, and, as will be seen later, the neutral right to trade remains, on principle, unaffected by war. According to the better view, if the transaction is merely a commercial one, providing for the *bonâ fide* payment of reasonable interest, it involves no derogation from neutrality calling for government interference. To this effect were the opinions of the English law officers given in reply to Mr. Canning in 1823: 'With respect to loans, if entered into merely with commercial views, we think, according to the opinions of writers on the law of nations, and the practice that has prevailed, that they would not be an infringement of neutrality.' It has been decided in America<sup>2</sup> and in England<sup>3</sup> that it is illegal for individuals to raise money by way of loan to assist subjects of a foreign state, so as to enable them to prosecute a war against their own Government, while the latter is in amity with that of the lenders. In cases where the belligerent persons are independent powers, the right of neutral individuals to make *bonâ fide* loans is well recognised in practice. Mr. Hall notices that during the Franco-German War both the French loan and part of the North German Confederation loan were issued in England.

At the Hague in 1907 it was laid down that a neutral (who is defined as the national of a state who is not taking part in the war<sup>4</sup>) cannot claim the benefit of his neutrality if he commits hostile acts against a belligerent, or acts in favour of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties; but that in such a case he is not to be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent state could be for the same act.<sup>5</sup> But he does not commit an act in favour of one

<sup>1</sup> Art. 7.

<sup>2</sup> *Kennet v. Chambers*, 14 Howard 38.

<sup>3</sup> *De Wiltz v. Hendricks*, 9 Moore, C.P. 586.

<sup>4</sup> Article 16 of Convention V. of 1907.

<sup>5</sup> Art. 17.

of the belligerents by furnishing supplies or making loans to one of them, provided that he does not live in the territory belonging to or in the occupation of the other party, and that the supplies do not come from such territory : or by rendering services in matters of police or civil administration.<sup>1</sup> These provisions were not accepted by Great Britain, France, Russia or Japan. They had originally formed part of a wider proposal made by Germany, which would have placed neutrals resident in a belligerent country in a far better position as regards freedom from services and contributions to the war than the nationals of the country : and this the states mentioned were not prepared to allow. But in principle there seems to be no objection to the rules laid down as to the furnishing of supplies and loans.<sup>2</sup>

Neutral Money  
Loans.

6. Volunteering on the part of neutral individuals for the service of belligerents has long been forbidden by municipal systems. In this country it was provided, as long ago as the reign of George II., that if any subject of Great Britain shall enlist himself in any foreign service without licence under the king's sign-manual, he shall be guilty of felony without benefit of clergy.<sup>3</sup> Such acts are, moreover, generally forbidden in terms by proclamations of neutrality issued on the outbreak of war. At the same time, it is held that isolated cases of disobedience are not imputable to a Government which has observed proper precautions. There is reason to believe that the number of foreigners serving with the Boer forces in the recent war was considerable, but there was no disposition to see in that circumstance a derogation from the neutrality of the states to which they respectively belonged.

Foreign En-  
listment.

7. Under the same head as the last falls the prohibition imposed upon neutrals from allowing their territory to be used by a belligerent in a mode derogatory to the neutral sovereignty. Canning, in a speech delivered in 1823, referred to a memorable American precedent :—

Use of Neutral  
Territory.

‘If I wished,’ said he, ‘for a guide in a system of neutrality, I

<sup>1</sup> Art. 18.

<sup>2</sup> See *Parl. Papers*, Misc., No. 4 (1908); pp. 134-145; Westlake, *International Law*, Part II. p. 285; Pearce Higgins, *The Hague Conferences*, p. 293.

<sup>3</sup> 9 Geo. II. c. 30, 29 Geo. II. c. 17; and *cf.* the Foreign Enlistment Act, 1870, secs. 4 and 7.



Use of Neutral  
Territory.

should take that laid down by America in the days of the presidency of Washington and the secretaryship of Jefferson. In 1793 complaints were made to the American Government that French ships were allowed to fit out and arm in American ports for the purpose of attacking British vessels, in direct opposition to the laws of neutrality. Immediately upon this representation the American Government held that such a fitting out was contrary to the laws of neutrality, and orders were issued prohibiting the arming of any French vessels in American ports. At New York a French vessel fitting out was seized, delivered over to the tribunals, and condemned. Upon that occasion the American Government held that such fitting out of French ships in American ports for the purpose of cruising against English vessels was incompatible with the sovereignty of the United States, and tended to interrupt the peace and good understanding which subsisted between that country and Great Britain.<sup>1</sup>

Mr. Jefferson's opinion was elicited by the extraordinary views of belligerent right held by Mr. Genêt, then French Minister in the United States. Besides the acts referred to in the above passage, complaint was made that he issued commissions to American citizens to fit out privateers and prey upon British commerce. Mr. Jefferson, in a note to the American ambassador in Paris, indicated the element of illegality with great propriety:—

'The right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign power or person can levy men within its territory without its consent. . . . If the United States have a right to refuse the permission to arm vessels and raise men within their ports and territories, they are bound by the laws of neutrality to exercise that right and to prohibit such armaments and enlistments.'<sup>2</sup>

8. The soundness of Mr. Jefferson's conclusion has never been seriously questioned, and the proposition is now elementary that a neutral may not permit a belligerent either to arm vessels or issue commissions within the neutral jurisdiction. The Convention of 1907 laid it down, in accordance with these principles, that 'corps of combatants

<sup>1</sup> Canning's *Speeches*, vol. v. pp. 50, 51.

<sup>2</sup> *American State Papers*, i. 116. Cf. Wolfius, *Jus Gentium*, § 754, and Vattel, *Droit des Gens*, III. c. ii. § 15; and cf. also the provision against the fitting out of expeditions contained in § 11 of the Foreign Enlistment Act, 1870.

cannot be formed, nor recruiting offices opened, on the territory of a neutral power, in the interest of the belligerents'<sup>1</sup> and that 'a neutral power does not incur responsibility by the fact that persons cross the frontier singly in order to place themselves at the service of one of the belligerents.'<sup>2</sup> The analogous rule in maritime warfare is to be found in the provision that 'a neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise or engage in hostile operations, which has been adopted entirely or partly within the said jurisdiction for use in war.'<sup>3</sup> It has not, however, always appeared equally clear whether the neutral may himself supply arms and military equipment to belligerents.

Use of Neutral Territory.

The better opinion has been that such sales are inconsistent with neutral duty in cases where the neutral state is itself the vendor, and the point may probably be regarded as settled by Article 6 of Convention XIII. of 1907, quoted above on p. 193. The Swedish Government acted on this principle in 1825, and cancelled, in deference to a Spanish remonstrance, the sale of six frigates, which had been purchased mediately on behalf of the Mexican insurgents. The case of neutral individuals who, unlike their Government, are traders in arms, is judged by a correspondingly different standard, a difference which was duly recognised in Article 7 of the same Convention. Traffic in arms is permitted to such persons, and is powerless to compromise the neutrality of their Government, but, as the supply of arms to one belligerent is clearly injurious to the other, the latter is permitted to repress the traffic on his own behalf. This question belongs therefore to the subject of contraband.

Supply of Arms.

9. The dividing line between acts which the neutral Government is bound to restrain, and those in which its subjects are permitted to engage at their peril, is not always easy to determine. If such a Government is not bound to prevent its subjects from supplying guns to a belligerent, may it ac-

The Alabama Case.

<sup>1</sup> Art. 4 of Convention V. of 1907. <sup>2</sup> Art. 6. <sup>3</sup> Art. 8 of Convention XIII. of 1907.



The Alabama  
Case.

quiesce in the preparation and sale of an armed vessel under the same circumstances? On principle, the cases are hardly distinguishable. 'There is nothing,' said Story, J., in the *Santissima Trinidad*,<sup>1</sup> 'in the law of nations that forbids our citizens from sending armed vessels as well as munitions of war to foreign ports for sale. It is a commercial adventure which no nation is bound to prohibit. . . . It is apparent that though equipped as a vessel of war [the *Independencia*] was sent to Buenos Ayres on a commercial adventure, contraband, indeed, but in no shape violating our laws or our national neutrality.' The difficulty in particular cases is to determine whether the vessel in the circumstances under which it is sold amounts to an 'expedition' which the neutral is bound to restrain, or is merely a contraband article. The distinction was brought into great prominence at the time of the American Civil War in connection with the notorious *Alabama*. This vessel, which was evidently intended for warlike purposes, was launched at Liverpool on May 15, 1862. The United States minister drew the attention of the British Government to the fact that the vessel was intended for the Confederate States, and demanded its arrest. A week later the law officers of the crown advised that 'if sufficient evidence can be obtained to justify proceedings under the Foreign Enlistment Act, such proceedings should be taken as early as possible.' The difficulty was that the provisions of the existing Foreign Enlistment Act (59 Geo. III. c. 69) were far from satisfactory. Their inadequacy was pointed out in the *Alexandra*<sup>2</sup> by the Court of Exchequer, when an opinion was expressed by Baron Bramwell that the material sections prohibited that equipment only of a vessel by a neutral, which was itself such that by means of it the vessel could commit hostilities, and that no equipment which gave no means of attack and defence was within the section. The learned Baron added<sup>3</sup>: 'I think that a vessel departing neither armed nor equipped so as to be capable of attack or defence is not a violation of international law, be its object what it may. . . . I am aware of the consequences if this is the law. A ship may sail from a port ready to receive a

<sup>1</sup> 7 Wheaton, 346.

<sup>2</sup> 2 H. and C. 431 (1863); cf. the ship *Mermaid*, Bee's *Am. Adm. Rep.* 69.

<sup>3</sup> *Ibid.* at p. 542.

warlike equipment; that equipment may leave in another vessel and be transferred to her as soon as the neutral limit is passed or at some not remote port, and thus the spirit of international law may be violated, and the letter and spirit of the municipal law evaded.' Similar views seem to have been taken by the English commissioners of customs in the *Alabama* case. They acted on the assumptions that a ship is *prima facie* a subject of innocent merchandise, that the neutral is only concerned to see that at the time of leaving the territory it is 'incapable of attack and defence,' and that the implements of attack and defence may follow separately from a different part of the neutral territory without a violation of it, provided that the junction does not take place till the neutral zone is crossed. The *Alabama* was allowed to leave for the Azores, where she met the *Bahama* and the *Agrippina*, also from England, from which she obtained crews and military supplies. The English authorities were ignorant of the connection between these vessels and the *Alabama*. The latter vessel received a commission as a Confederate cruiser, and the extent of the destruction which she afterwards wrought on the commerce of the enemy is well within living memory. The facts in connection with the *Florida* were very similar. The United States made a heavy claim against the British Government in respect of their alleged default, claiming in addition to the damages directly occasioned by these vessels, indemnity for—(1) The increased rates of insurance in the United States made necessary by their depredations. (2) The transfer of the American carrying trade to England. (3) The prolongation of the war. After long negotiation it was agreed by the Treaty of Washington in 1871 that the questions at issue between the two countries should be submitted to arbitration. The arbitrators met at Geneva in the same year. In estimating the legal value of their findings, it must not be forgotten that their authority depended merely on the mandate of two individual nations, and that the terms of the reference imposed upon them standards of conduct into the legality of which they were not concerned to inquire. The rules by which their decision was to be guided were contained in Article 6 of the Treaty, and ran as follows:—

'A neutral Government is bound—

'First, To use due diligence to prevent the fitting out, arming,

The *Alabama*  
Case.



The Alabama  
Case.

or equipping within its jurisdiction of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a power with which it is at peace, and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war against a power with which it is at peace, such vessel having been specially adapted, in whole or in part, within such jurisdiction to warlike use.

'Secondly, Not to permit or suffer either belligerent to make use of its ports or waters, as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

'Thirdly, To exercise due diligence in its waters, and as to all persons within the jurisdiction, to prevent any violation of the foregoing obligations and duties.'

## The Award.

10. The Arbitration Tribunal, on this reference, condemned Great Britain to pay to the United States in respect of the damage done by the *Alabama*, the *Florida*, and their tenders, the sum of \$15,500,000. The American claims in respect of indirect damage were rejected at an early stage. The three rules on which the award depended had merely a conventional authority: but the second rule was in effect adopted at the Hague in 1907. 'Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries'<sup>1</sup>: and the first rule became Article 8 of Convention XIII., which has already been set out (*see* p. 197 *supra*). The ambiguous phrase 'due diligence' has disappeared, the words 'a belligerent Government is bound to employ the means at its disposal to prevent the fitting out,' etc., taking its place. It is not clear that the new phraseology is much less open to objection than the old: it is still vague and general, and leaves open to dispute such questions as, What were the means at the disposal of the neutral, and what is meant by 'adopted entirely or partly, within the said jurisdiction, for use in war?'

The dividing line between legitimate and illegitimate commerce is very difficult to draw in particular cases, but the distinction of principle is less obscure. The export of weapons by neutral subjects is a legitimate branch of commerce subjecting the goods to seizure as contraband, but in no case involving their Government: on the other hand, a

<sup>1</sup> Art. 5 of Convention XIII. of 1907.

neutral Government is bound to prevent its subjects from handing over a commissioned armed vessel to a belligerent within neutral territory, for to do so is to countenance an expedition. The Alabama Case.

A tendency has been shown to extend on this point belligerent requirements, and it is likely enough that a violation of the above rules will be held to have taken place where they are verbally observed, but broken in their spirit. An effect of this tendency may be found in the increasing stringency of municipal requirements,<sup>1</sup> and a resolution of the Institute of International Law in 1875 supplies a further illustration.<sup>2</sup>

11. The well-known Terceira incident illustrates the principle that a neutral must use reasonable diligence to prevent colourable violations of its neutrality when the several parts of a hostile expedition, each being in itself innocent, leave the jurisdiction separately and combine outside it. In 1827 during the civil war in Portugal between Donna Maria and Don Miguel, Count Saldanha left England with four ships intended for the service of Donna Maria at Terceira, but bound ostensibly for Brazil. The expedition was unarmed, but military stores also clearing from this country had preceded it. It was intercepted by H.M.S. *Ranger* off Port Praya in Terceira and escorted back. The interference was entirely justifiable in essence, but its exercise in Portuguese sovereignty was itself open to criticism. Terceira Incident.

<sup>1</sup> The United States, Italy, Austria, Spain, and Denmark forbid the equipment of armed vessels for a belligerent, and by section 8 of the Foreign Enlistment Act, 1870, any person commits an offence who (1) 'Builds or agrees to build, or causes to be built, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state: or (2) issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state: or (3) equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state: or (4) despatches or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any friendly state.'

<sup>2</sup> L'Etat neutre est tenu de veiller à ce que d'autres personnes ne mettent des vaisseaux de guerre à la disposition d'aucun des Etats belligérants dans ses ports ou dans les parties de mer qui dépendent de sa juridiction.



## Neutral Rights.

12. The points which still require treatment in this chapter may be more conveniently dealt with under the correlative head of neutral rights, though the observation of Mr. Jefferson already quoted (and embodied in the Convention of 1907<sup>1</sup>), must not be lost sight of, that if a neutral Government enjoys as regards one of the belligerents a right, it is bound, as regards the other, to enforce it.

Neutral states are then both entitled and bound to demand that the belligerents shall abstain from hostilities in their territory or their territorial waters, and it is not a hostile act in a neutral if he repels, even by force, an attack upon his neutrality.<sup>2</sup> In 1863 an American man-of-war found and captured the Confederate vessel, *Chesapeake* off Sambro, a harbour of Nova Scotia. The legality of the act was not seriously maintained, and the American reply to the English complaint could find no better plea in law than that the captain had acted 'under the influence of a patriotic and commendable zeal to bring to punishment outlaws who had offended against the peace and dignity of both countries.' In the *Anna*<sup>3</sup> Lord Stowell directed restitution of a merchantman captured within three miles of some mud islands situate in the mouth of the Mississippi, but more than three miles from the mainland. 'I am of opinion,' he observed,<sup>4</sup> 'that the privateer has laid herself open to great reprehension. Captains must understand that they are not to station themselves in the mouth of a neutral river, for the purpose of exercising the rights of war from that river, much less in the very river itself.' But the capture of a prize in violation of neutrality is valid as between the belligerents themselves; it rests with the state whose neutrality has been violated to claim restitution.<sup>5</sup> In 1907 it was agreed that if the prize is still within its jurisdiction, that state must employ the means at its disposal to release it, with its officers and crew, and to intern the prize crew; if it is not within the jurisdiction, the captor must, at the neutral's demand, release it.<sup>6</sup> Whether the right of the neutral in such a case is overridden by condemnation, or by sale to an innocent third party, has been

<sup>1</sup> Art. 5 of Convention V.<sup>2</sup> Art. 10.<sup>3</sup> 5 C. Rob. 373 (1805).<sup>4</sup> *Ibid.* p. 385e.<sup>5</sup> Westlake, *International Law*, Part II. p. 199.<sup>6</sup> Article 3 of Convention XIII. The neutral power would have a right of appeal in this case to the proposed new International Prize Court. See p. 223, *infra*.

regarded as uncertain; but the better view is that it is Neutral Rights. not.<sup>1</sup>

13. Bynkershoek<sup>2</sup> suggested a qualification to the above rule against the exercise of hostilities in neutral waters, which has never prevailed, though it has been sometimes relied on. He expressed the opinion that the belligerent might legally push home to neutral waters a chase commenced in the open sea. He might finish his capture *dum fervet opus*.<sup>3</sup> The alleged exception is unsupported by authority, though in the *Anna*<sup>4</sup> Lord Stowell was prepared to admit that it would be pardonable in a cruiser, which had summoned a vessel to stand by, to pursue that vessel if it fled to within three miles of uninhabited mud flats technically forming part of neutral territory. But the exception would be a dangerous precedent to admit.

14. A belligerent who has suffered from a violation of neutral territory by his enemy is entitled to demand that the neutral shall take such steps to procure an indemnity as he might reasonably be expected to adopt, having regard to the circumstances, in a case in which his own interests were involved.

If a belligerent vessel captured in neutral waters was itself the first to open hostilities, it of course loses all claim upon the neutral for redress; if, being first attacked, it merely defends itself, the position is not so clear. In the *Anne*<sup>5</sup> self-defence was apparently regarded as justifiable,<sup>6</sup> and in the case of the *General Armstrong* (1814) it appears that the captured vessel was the first to fire, and though having time to apply to the neutral for protection, it neglected to do so, and was held to have thereby released the neutral from all obligation. This case, therefore, quoted by Hall<sup>7</sup> in support of the proposition that 'a belligerent who, when attacked in neutral territory, elects to defend himself, instead of trusting for protection or redress to his host, by his own violation of sovereignty frees the neutral from responsibility,' hardly supports that proposition: and the better view is that expressed by Professor Westlake,<sup>8</sup> that the threatened vessel must give the neutral, if possible,

<sup>1</sup> Westlake, *International Law*, Part II. p. 199; and Hall 6th ed. p. 618.

<sup>2</sup> *Questiones juris publici*, i. 8.

<sup>3</sup> While the chase is hot.

<sup>4</sup> 5 C. Rob. 373 (1805).

<sup>5</sup> iii. Wheaton, 435, 447.

<sup>6</sup> And cf. Westlake, *International Law*, Part II. p. 203, where this view is taken.

<sup>7</sup> 6th ed. p. 620.

<sup>8</sup> *International Law*, Part II. p. 203.



Neutral Rights. an opportunity of doing his duty either by force or by peaceful means. If there is no time for this, or the neutral disregards the appeal, it is hardly reasonable to expect the threatened vessel to submit quietly to capture.

Right of  
Asylum.

15. A neutral is allowed, consistently with his continuing friendship towards both belligerents, to receive their troops or vessels within his territory under circumstances which ensure that the use of his hospitality will be unaggressive in its direct and indirect results. Under these circumstances a French army sought and obtained shelter in Switzerland in 1871. Such reception is properly conditioned, in the case of land forces, upon an agreement by the fugitives to undergo disarmament in crossing the frontier, and internment within the neutral territory, as long as hostilities last. By the Convention of 1907 the neutral must intern such troops, so far as possible, at a distance from the theatre of war, and can keep them in camps or even confine them in fortresses or places appropriated to the purpose; he may at his discretion release the officers on parole not to leave the neutral territory without permission. He must (in default of a special Convention on the subject) furnish them with food, clothing and the relief which humanity dictates (being entitled to reimbursement at the conclusion of peace); and he may allow the sick or wounded to pass over his territory, provided that the trains bringing them carry neither *personnel* nor material of war, and must adopt towards them such measure of safety and control as may be necessary. Wounded and sick brought into neutral territory by one of the belligerents, and belonging to the other, must be prevented by the neutral from taking further part in the operations of war: and the same duty devolves on the neutral with regard to wounded or sick of the other army who may be committed to his care. Generally, the Geneva Convention applies to the sick and wounded interned in neutral territory.<sup>1</sup>

16. In the case of maritime warfare, the requirements of neutral hospitality are less exacting, though recent events have shown a tendency to approximate the rules on sea to those on land. It was fairly generally agreed, up to the time of the Russo-Japanese war, that a belligerent

<sup>1</sup> Arts. 11-15 of Convention V. of 1907.

vessel might take refuge in a neutral harbour without any obligation to disarm: and might there repair and obtain supplies and coal sufficient to carry her to the nearest port in her own country. In the words of Mr. Hall:<sup>1</sup>—'To disable a vessel, or to render her permanently immovable, is to assist her enemy; to put her in a condition to undertake offensive operations is to aid her country in its war. The principle is obvious: its application is susceptible of much variation, and in the treatment of ships, as in all other matters in which the neutral holds his delicate scale between two belligerents, a tendency towards the enforcement of a harsher rule becomes more defined with each successive war.' The principle that the vessel shall be enabled to reach the nearest point in her own country appears in the British Order in Council of 1862, with the addition that coal was only to be supplied to the same ship once in three months;<sup>2</sup> and it was adopted by Great Britain during the Franco-German (1870-71), the Spanish-American (1898), and the Russo-Japanese war (1904). But a further step was taken by Great Britain in 1904, when, by the Declaration of the Governor of Malta,<sup>3</sup> a belligerent fleet proceeding to the seat of war, and belligerent vessels whose object was to intercept neutrals conveying contraband, were prohibited from coaling at all in British waters, unless in distress.

17. The right of taking refuge in neutral ports was also subject to special conditions when vessels belonging to two belligerents happened to meet in the same neutral port. Early in the eighteenth century the practice sprang up of detaining a privateer for twenty-four hours after the departure of its enemy; while in the case of a regular war ship it was a common custom to require the word of the commander that he would not attack an enemy vessel which had left the same port shortly before.<sup>4</sup> The twenty-four hours' rule, however, became one of general application, and was to be found both in treaties and in regulations and declarations.<sup>5</sup> But it lent itself to abuse, as was illustrated by the *Tuscarora*, in 1861;

<sup>1</sup> 6th ed. p. 622.

<sup>2</sup> Smith and Sibley, *International Law as Interpreted during the Russo-Japanese War*, 2nd ed. p. 133, 134.

<sup>4</sup> Hall, 6th ed. p. 623; Smith & Sibley, *ibid.*, pp. 132, 133.

<sup>5</sup> Cf. Westlake, *International Law*, Part II. p. 207.

<sup>3</sup> *Ibid.*, p. 135.



Belligerent  
Ships in Neutral  
Ports.

which practically blockaded the *Nashville* in Southampton, by remaining under steam, leaving the harbour whenever the latter vessel showed signs of moving, and returning before the twenty-four hours had expired.<sup>1</sup> This manœuvre was met by the Order in Council of 1862, which required a belligerent war vessel to leave within twenty-four hours of arrival, 'except in case of stress of weather, or of her requiring provisions or things necessary for the subsistence of her crew, or repairs:' in which latter cases she was to leave as soon as possible. This rule was subsequently adopted even by the United States, but was never accepted by Germany, France, or Russia.<sup>2</sup>

18. During the Russo-Japanese war there took place several events which appeared to be a great extension of the limits of neutral duty: but may have been merely illustrations of the principle that a vessel taking refuge in a neutral port must leave within twenty-four hours, or so soon after that period as possible. Several Russian vessels were dismantled and disarmed by neutrals; for instance, a gunboat, the *Mandjur*, a destroyer, the *Grosvoï*, and a cruiser, the *Askold*, at Shanghai; a cruiser, the *Diana*, at Saigon, and a battleship, the *Tsarevitch*, and some destroyers at Kiao-Chau. In most of the cases the crews were interned till the end of the war.<sup>3</sup> But that departure within a short period was allowed as an alternative to disarmament, is shown by the case of the *Novik*, which was allowed to leave Tsing-tau after a stay of ten hours, and the option of departure or disarmament which was given to the cruisers, the *Aurora*, *Oleg* and *Zamtchug*, at Manilla, and to a transport, the *Lena*, at San Francisco; this vessel being ultimately, by agreement, disarmed. The Japanese carried the claim to have vessels in such circum-

<sup>1</sup> Smith and Sibley, *International Law as Interpreted during the Russo-Japanese War*, 2nd ed. p. 134; Hall, 6th ed. p. 625.

<sup>2</sup> Pearce Higgins, *The Hague Peace Conferences*, p. 470. Professor Westlake points out (*International Law*, Part II. p. 209) that the British rule does not confer any right of asylum even for twenty-four hours, and that a neutral is left free by it to refuse such asylum altogether in the case where the belligerent vessel is in flight from its enemy; in which case internment for the rest of the war would be the proper course. The point, however, is not one of much practical importance; a vessel in such a condition would, in very few cases, be able or willing to leave in twenty-four hours, and if it stayed longer, its internment would naturally follow.

<sup>3</sup> Cf. Hall, 6th ed. p. 622; Smith and Sibley, *ibid.*, p. 136.

stances disarmed so far as to enter a Chinese port and capture a Russian destroyer, the *Ryeshitelni*, lying there; but the neutrality of China was not treated very seriously by either belligerent. It is to be noted, too, that certain states (Norway, Sweden and Denmark) closed certain ports to belligerent war ships altogether, except in cases of distress.<sup>1</sup>

Belligerent Ships  
in Neutral Ports.

19. At the Hague, in 1907, the whole question received very elaborate consideration, and a body of rules was agreed upon which, in substance, confirmed the legality of what had taken place during the recent war. The capture of the *Ryeshitelni* was, it is true, disapproved by the Article forbidding any act of hostility, including capture and search, in neutral waters;<sup>2</sup> and no other conclusion could well be reached on that point. But after laying stress upon the necessity for impartial treatment of the two belligerents (reserving, however, to a neutral the right to close its ports to a belligerent vessel which has failed to conform to its orders or regulations, or has violated neutrality<sup>3</sup>), the Conference agreed that 'the neutrality of a power is not affected by the mere passage through its territorial waters of warships or prizes belonging to belligerents'<sup>4</sup> and that 'a neutral power may allow belligerent warships to employ its licensed pilots.'<sup>5</sup> Whether a neutral may forbid the 'innocent passage' of belligerent war vessels was left undecided, the general feeling being that such prohibition was lawful if necessary for the maintenance of neutrality, except in the case of straits uniting two open seas.<sup>6</sup> But the United States put in a general objection to Article 10, and Turkey and Japan declined to bind themselves to recognise an exception relative to straits between open seas.

20. There followed the more difficult question of the length of stay permitted in neutral ports. After considerable difference of opinion the rules ultimately adopted were of the nature of a compromise, to the effect that unless a neutral made special provision to the contrary, belligerent war ships were not to remain in neutral ports, roadsteads, or territorial waters for

<sup>1</sup> Pearce Higgins, *The Hague Peace Conferences*, p. 460.

<sup>2</sup> Art. 2 of Convention XIII.

<sup>3</sup> Art. 9.

<sup>4</sup> Art. 10.

<sup>5</sup> Art. 11.

<sup>6</sup> Misc., No. 4, 1908, p. 240; and cf. Pearce Higgins, *ibid*, p. 468.



Belligerent  
Ships in Neutral  
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more than twenty-four hours;<sup>1</sup> that the neutral must order the vessel to depart within that time, or such time as may be fixed by the local law,<sup>2</sup> and that only damage or stress of weather could justify a more prolonged stay.<sup>3</sup> An exception was made for the case of war ships exclusively devoted to religious, scientific, or philanthropic missions.<sup>4</sup> The same compromise between a fixed rule and freedom of action to the neutral is seen in the provision that in default of special dispositions to the contrary by the neutral, the maximum number of war ships belonging to a belligerent which may be in a belligerent port or roadstead shall be three.<sup>5</sup> The existing practice is adopted in the rule that when war ships of both belligerents are present together in a neutral port or roadstead, not less than twenty-four hours must elapse between the departure of the one and the departure of the other, the order of departure being determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible; and a belligerent warship was (as was suggested by the 'Institut de Droit International' in 1898) forbidden to leave for twenty-four hours after the departure of a merchant ship flying the flag of its adversary.<sup>6</sup> These provisions involve, of course, in certain cases exceptions to the rule against staying for more than twenty-four hours. Further, an attempt was made to define the limits within which belligerent war ships may take advantage of their stay. In neutral ports and roadsteads they may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any way to their fighting force; the decision as to what repairs are necessary being left to the local authorities.<sup>7</sup> They may not use neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armaments, or for completing their crews;<sup>8</sup> they may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.<sup>9</sup> The question of coaling caused some difficulty: and the rule in its final form did not meet with unanimous acceptance. It was provided first that such vessels may only ship sufficient fuel to enable them to

<sup>1</sup> Art. 12.

<sup>2</sup> Art. 13.

<sup>3</sup> Art. 14.

Art. 14.

<sup>5</sup> Art. 15.

<sup>6</sup> Art. 16.

<sup>7</sup> Art. 17.

<sup>8</sup> Art. 18.

<sup>9</sup> Art. 19.

reach the nearest port in their own country, and this was in accord with the British view; but the Article proceeds:—  
 'They may, on the other hand, fill up their bunkers built to carry fuel, when they are in neutral countries which have adopted this mode of determining the amount of fuel to be supplied.' This represented the German, French and Russian view. It was added that 'if, in accordance with the law of the neutral power, the ships are not supplied with coal within twenty-four hours of their arrival, the duration of their permitted stay is extended by twenty-four hours.'<sup>1</sup> Great Britain and Japan objected to the provision which enabled a belligerent vessel to obtain its full complement of coal, and refused to accept this Article: and the whole Convention has not been signed by the United States.<sup>2</sup> The rule which, as we have seen, was laid down by Great Britain, in 1862,<sup>3</sup> was adopted in the provision that a belligerent war vessel which has shipped fuel in a port belonging to a neutral power may not replenish its supply within three months in a port of the same power;<sup>4</sup> but this was not accepted by Germany. Finally, it was agreed that if, notwithstanding a notification by a neutral power, a belligerent war ship does not leave a port where it is not entitled to remain, the neutral may take such measures as it considers necessary to render the ship incapable of putting to sea so long as the war lasts, and the commanding officer of the ship must facilitate the execution of such measures: that, when the ship is detained, the officers and crew are to be detained either in it, or in another vessel, or on land, and subject to such restrictions as may appear necessary, with power to release the officers on parole not to quit the neutral territory without leave;<sup>5</sup> that the neutral is bound to exercise such vigilance as the means at its disposal permit to prevent any violation of the provisions agreed upon,<sup>6</sup> and that the exercise by the neutral of the powers given by the present Convention are in no circumstances to be considered as an unfriendly act by a belligerent who has accepted the Articles relating thereto.<sup>7</sup>

21. It follows naturally from the exclusiveness of national

Prisoners in  
Neutral  
Territory

<sup>1</sup> Art. 19. <sup>2</sup> See Pearce Higgins, *The Hague Peace Conferences*, p. 477.

<sup>3</sup> See p. 205, *supra*.

<sup>4</sup> Art. 20.

<sup>5</sup> Art. 24.

<sup>6</sup> Art. 25; and *cf.* par. 3 of the Treaty of Washington, p. 200, *supra*.

<sup>7</sup> Art. 26.



Prisoners in  
Neutral Terri-  
tory.

sovereignty that if a belligerent brings his prisoners within neutral territory, they instantly recover their freedom. This fact was well expressed by an Austrian ordinance of 1803: '... aussitôt que ... prisonniers [de guerre] auraient mis le pied sur le territoire d'un souverain neutre ou ami de leur gouvernement ils devront être regardés comme libres, et toutes les autorités civiles et militaires leur devront, sous ce rapport, protection et assistance.' By Convention V. of 1907 it was agreed that 'a neutral power which receives prisoners of war who have escaped shall leave them at liberty. If it allows them to remain in its territory, it may assign them a place of residence. The same rule is applicable to prisoners of war brought by troops taking refuge in the territory of a neutral power';<sup>1</sup> for when the captors are compelled to fly to neutral territory for safety, they clearly must be taken to have lost their right to retain their prisoners. This principle, however, is not carried to its logical conclusion in the case of

Prizes in Neutral  
Ports.

prizes taken by belligerents into neutral harbours. In these cases the title of the captor is not necessarily complete. Mere seizure of enemy property is sufficient as against the enemy, while so far as the rights of other persons (*e.g.*, recaptors) are concerned, ownership may (according to the views of some nations, but not Great Britain, which would look only to condemnation by a proper Court) pass in accordance with the tests of twenty-four hours' possession or removal to a place of safe custody<sup>2</sup>; and in the case of neutral property, title can be only completed by the judgment of a competent prize court. The belligerent, therefore, on taking prizes into neutral ports, in certain cases, in Mr. Hall's words, 'brings there property which does not yet belong to him; in other words, he continues the act of war through which it has come into his power.'<sup>3</sup> The anomaly by which permission is granted to do this is noted by Phillimore.<sup>4</sup> 'An attentive review of all the cases decided in the courts of England and the North American United States during the last war (1793-1815), leads to the conclusion that the condemnation of a capture by a regular prize court, sitting in the country of the belligerent, of a prize lying at the time of the sentence in a neutral port, is irregular, but clearly valid.' But neutrals have become very reluctant to grant the shelter of their

<sup>1</sup> Art. 13. <sup>2</sup> Hall, 6th ed. p. 448 *et seq.* <sup>3</sup> *Id.*, p. 614. <sup>4</sup> iii. § ccclxxix.

harbours to belligerent's prizes, so that instances of this irregular practice are likely to be rare in the future; and the question was dealt with by Convention XIII. of 1907. It was first agreed, as we have seen (and the point was beyond dispute), that a national prize court cannot be established by a belligerent on neutral territory, or on a vessel in neutral waters,<sup>1</sup> and that the neutrality of a power is not affected by the mere passage of prizes belonging to belligerents through its territorial waters.<sup>2</sup> The general principle was then laid down that 'a prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew, and to intern the prize crew.'<sup>3</sup> Release of the prize was also to follow in the case of one brought into a neutral port in circumstances other than those referred to.<sup>4</sup> But to this rule an exception was made:—'A neutral power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered, pending the decision of a prize court. It may have the prize taken to another of its ports. If the prize is convoyed by a war ship, the prize crew may go on board the convoying ship. If the prize is not under convoy the prize crew are left at liberty.'<sup>5</sup> This Article, proposed with the object of reducing the danger of the destruction of prizes, was not agreed to by Great Britain and Japan on the ground that it made no reference to the fundamental distinction between enemy and neutral prizes, that its value in preventing the destruction of neutral prizes was doubtful, and that it placed too heavy a burden upon the neutral.<sup>6</sup> It would also give authority to the practice described by Phillimore as 'irregular';<sup>7</sup> and Great Britain was unwilling to admit any relaxation of her rule that a neutral prize must be taken by the captor into one of his own ports or released.<sup>8</sup> But even in the view of those states which accept this Article, it remains entirely in the dis-

Prizes in Neutral Ports.

<sup>1</sup> Art. 4.

<sup>2</sup> Art. 10.

<sup>3</sup> Art. 21.

<sup>4</sup> Art. 22.

<sup>5</sup> Art. 23.

<sup>6</sup> Misc., No. 4 (1908), p. 252. <sup>7</sup> See p. 210, *supra*.

<sup>8</sup> See Ch. ix., *infra*.



Passage through  
Neutral Terri-  
tory.

cretion of the neutral whether prizes are admitted in this way or not.

22. Opinion has varied on the question whether a neutral may properly permit a belligerent army to pass through his territory. Such a permission was formerly held to be consistent with neutral duty, though later writers added the requirement that the right must be equally conceded to both belligerents. The qualification is not perhaps very reasonable, for it may very easily happen that a passage through neutral territory which is of importance to one belligerent offers no advantage whatever to the other. A belligerent will hardly demand leave to pass through such territory unless he hopes to derive some military advantage therefrom. It follows that the permission to do so is unneutral. Vattel's general statement<sup>1</sup> of the duties of a neutral is accurate, with a single exception, and it is decisive upon the point: A neutral is bound not to give any assistance, except where there is a previous stipulation, nor of its own will to furnish troops, arms, ammunition, or anything of direct use in war. He adds that to give assistance equally is absurd; a state cannot equally assist two enemies. The same things, the same number of troops, the like quantity of arms and of munitions furnished under different circumstances, are no longer equivalent succours. This view has prevailed in later times, and Phillimore<sup>2</sup> alone of modern writers supports the legality of conceding military passage. It will be noticed that Vattel makes a reservation in favour of the neutral when assistance is given pursuant to an existing treaty, and Mr. Hall notes that the question might still arise in Europe, for the railway from Constance to Basle, which leads from the interior of Germany to the Rhine, passes through the Canton Schaffhausen, and Germany has a right of military passage over it. The question arose in the South African War in which this country was recently engaged. Sir Frederick Carrington was permitted to land at Beira in Portuguese territory with a British force on its way to Rhodesia. It appears that the Transvaal Government protested against the concession, which was defended by the Portuguese ministry in the course of debate, on the ground that England had stipulated for the right of passage in existing treaties.

<sup>1</sup> *Droit des gens*, lib. iii. c. 7, § 104.

<sup>2</sup> iii. § 153.

On principle this line of defence does not appear to be satisfactory. As between one belligerent A and a neutral C, it is either illegal for C to give B, the other belligerent, a right of passage, or it is not. If it is not, *cadit quæstio*; if it is, how can C defend himself to A by the plea that he was under contract to perform an illegal act?<sup>1</sup>

The Hague Conference, then, adopted the better view in the Article already referred to,<sup>2</sup> which forbade the passage of troops or convoys across neutral territory.

23. It was also agreed that belligerents may not (and neutrals ought not to allow them to) erect on the territory of a neutral a wireless telegraphy station or any apparatus intended to serve as a means of communication with belligerent forces on land or sea, or make use of any installation of this kind established by them before the war on the territory of the neutral power for an exclusively military end, and which has not been opened for the service of public correspondence.<sup>3</sup> But a neutral power is not bound to forbid or restrain the use, for belligerents, of telegraph or telephone cables, or of wireless telegraphy apparatus, whether belonging to the neutral power or to companies or private individuals,<sup>4</sup> and any prohibition or restraint it imposes must be applied uniformly to both belligerents.<sup>5</sup> The importance of the agreement against the erection of wireless telegraphy apparatus on neutral territory is emphasised by the fact that Russia during the siege of Port Arthur erected and used a station on Chinese territory, though obviously the violation, of Chinese neutrality was as clear as if a body of troops had taken up a position there.<sup>6</sup> In relation to maritime warfare, a similar provision was agreed upon: 'belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries: in particular, they may not erect wireless telegraphy stations, or any apparatus for the purpose of communicating with the belligerent forces on land or sea.'<sup>7</sup>

24. A question of difficulty arises in continental warfare with regard to neutral railway material found on belligerent

<sup>1</sup> Cf. p. 193, *supra*.

<sup>3</sup> Arts. 3, 5 of Convention V. of 1907.

<sup>6</sup> Pearce Higgins, *The Hague Conferences*, p. 291.

<sup>7</sup> Art. 5 of Convention XIII. of 1907.

<sup>2</sup> Art. 2 of Convention V.

<sup>4</sup> Art. 8.

<sup>5</sup> Art. 9.

Passage through  
Neutral Territory

Wireless  
Telegraphy.

Railway  
Material.



Railway Material. territory. The Conference arrived at a somewhat vague compromise between the views of those who denied the belligerents' right of requisition at all, and those who claimed the right subject to the payment of indemnity:—'Railway material coming from the territory of neutral powers, whether it be the property of the said powers or of companies or private persons, and recognisable as such, shall not be requisitioned or utilised by a belligerent, except in so far as is absolutely necessary. It shall be sent back as soon as possible to the country of origin. A neutral power may likewise in case of necessity retain and utilise, to a corresponding extent, railway material coming from the territory of the belligerent power. Compensation shall be paid on either side in proportion to the material used and to the period of usage.'<sup>1</sup>

'Necessity' is, of course, an elastic term: and it is not very easy to see how a neutral in time of peace will often be able to establish such necessity as would justify the seizure of the property of a friendly nation, or of its subjects, and there would seem to be a danger of such right of seizure degenerating into something very like reprisals: though its intention is merely to allow the neutral to fill up the place of the rolling stock the belligerent has seized.<sup>2</sup>

<sup>1</sup> Art. 19.

<sup>2</sup> *Parl. Papers*, Misc., No. 4 (1908), p. 140.

## CHAPTER II

### BELLIGERENT GOVERNMENTS AND NEUTRAL INDIVIDUALS

1. THIS branch of international law has been produced by General the compromise between two irreconcilable principles, which Principles. may be generally stated as follows :—

- (1) Neutrals are entitled to prosecute their trade during the continuance of war.
- (2) Belligerents are entitled, for military purposes, to exercise a quasi-penal surveillance over certain forms of such trade.

2. It is important to notice carefully the legal character of acts which are prohibited under this head. The simplest illustration is furnished by the trade in contraband goods. *Prima facie* a neutral power has as good a right to carry on its trade with each of two belligerents during war as it possessed before its outbreak. Its friendship towards both parties continues, and it has, in a general way, full liberty to profit by the rise in market prices which commonly follows upon the outbreak of war. It was, however, long ago recognised that an indiscriminating licence to neutral traders was hardly to be reconciled with belligerent necessity. A state which had gradually exhausted the military supplies of its opponent could not tolerate their unrestricted renewal at the hands of neutral traders. At this point the rights of neutrals have definitely given way before those of belligerents. It is not, however, accurate to state that contraband trading, or the running of blockades, are illegal acts. The prohibition is relative, not absolute. In no case do such acts compromise the neutral Government, and the latter is neither legally nor morally constrained to discourage its subjects from engaging in them. The correct view was



General Principles.

very clearly laid down by Lord Westbury in *ex parte Chavasse, in re Grazebrook*:<sup>1</sup>—

‘In the view of international law, the commerce of nations is perfectly free and unrestricted. The subjects of each nation have a right to interchange the products of labour with the inhabitants of every other country. If hostilities occur between two nations, and they become belligerents, neither belligerent has a right to impose, or to require a neutral Government to impose, any restrictions on the commerce of its subjects. The belligerent power certainly acquires certain rights, which are given to it by international law. One of these is the right to arrest and capture, when found on the sea, the highroad of nations, any munitions of war which are . . . in the act of being transported in a neutral ship to its enemy. This right, which the laws of war give to a belligerent for his protection, does not involve as a consequence that the act of the neutral subject in so transporting munitions of war to a belligerent country is either a personal offence against the belligerent captor, or an act which gives him any ground of complaint either against the neutral trader personally or against the Government of which he is a subject. The right of the belligerent is limited entirely to the right of seizing and condemning as lawful prize the contraband articles. He has no right to inflict any punishment on the neutral trader, or to make his act a ground of representation or complaint against the neutral state of which he is a subject. In fact, the act of the neutral trader in transporting munitions of war to the belligerent country is quite lawful, and the act of the other belligerent in seizing and appropriating the contraband articles is equally lawful.’

3. In the case of contraband carriage, the noxiousness springs from the nature of the merchandise, whereas a declaration of blockade entirely withdraws from trade a particular area, and applies indifferently to all kinds of goods. In both cases, however, the controlling principle is identical. The right of the belligerent to carry his operations to a successful issue is allowed to override the rights normally belonging to the status of neutrality. The concession is a bare one, and attempts to extend it are likely to be jealously watched by neutrals in future warfare. Two such attempts have given rise at different times to practices which are very familiar, and one at least of which appears to have established

<sup>1</sup> 34 L.J. (Bkcy.) at p. 18.

itself. The practices in question are that of commercial blockade, and that which is known as the Rule of War of 1756.

4. The varieties of blockade have led to much confusion. It has been seen that a pacific blockade is a prebelligerent act conventionally held to fall short of war, and justifying (according to the better view) no constraint except towards the power blockaded. It will be seen that a blockade proper is the blocking of a hostile harbour or seaboard by ships, *as a step in military operations* in order to prevent ingress or egress. If such a blockade is ineffective, it is known as a 'paper blockade.' It was commonly held that the very grave interference with neutral trade involved in a blockade could only be justified by the coincidence of military operations, of which it formed a proximate part. The peculiarity of a commercial blockade lies in the fact that it assumes to dislocate neutral trade without the plea of imminent belligerent necessity, and indeed *without being necessarily associated with military operations at all*. According to the view which has prevailed, the sole condition of the validity of a commercial blockade consists in the power of the blockading squadron to make it effective. If, as is probably the case, this practice is to be treated as established, it will no longer be possible to repeat the proposition that the neutral right to trade remains unaffected by war, except in so far as the trade is obstructive to belligerent operations. Mr. Hall's illustration is a very forcible one<sup>1</sup>:—

Commercial  
Blockade.

'According to existing usage, it would be legitimate in a war between England and the United States for the former power to blockade the whole Californian coast while the only military operations were being conducted on the Atlantic seaboard and along the frontiers of Canada.'

The theoretic objection to such blockades was well stated in a circular<sup>2</sup> sent by Mr. Cass to the American representatives in Europe:—

'The investment of a place by sea and land, with a view to its reduction, preventing it from receiving supplies of men and materials necessary for its defence, is a legitimate mode of pro-

<sup>1</sup> *International Law*, 6th ed. p. 629.

<sup>2</sup> Quoted Cobden, *Speeches*, vol. ii. p. 288.



Commercial  
Blockade.

secuting hostilities, which cannot be objected to so long as war is recognised as an arbiter of national disputes. But the blockade of a coast, or of commercial positions along it, *without any regard to ulterior military operations*, and with the real design of carrying on a war against trade, and from its very nature against the trade of peaceful and friendly powers, instead of a war against armed men, is a proceeding which it is difficult to reconcile with reason or the opinions of modern times. To watch every creek and river and harbour upon an ocean frontier in order to seize and confiscate every vessel with its cargo attempting to enter or go out, without any direct effect upon the true objects of war, is a mode of conducting hostilities which would find few advocates if now first presented for consideration.'

Rule of War of  
1756

5. The right of neutrals to carry on all legitimately acquired trade was seriously threatened by what is known as the Rule of War of 1756, a rule which though it first came into prominence in that year, was supported by precedents of an earlier date.<sup>1</sup> In the eighteenth century European countries, by legislation upon the lines of the English navigation laws, were in the habit of restricting the commerce of their colonies to vessels of their own country. During the war against this country in 1756 the French became disabled, through their relative weakness upon the sea, from carrying on trade with their colonies. They then handed over the trade between the mother-country and her dependencies to Dutch vessels, but continued to exclude other neutral traders. The English prize courts thereupon condemned all Dutch vessels captured in the course of such traffic, on the ground that vessels so engaged had in fact passed into the merchant service of France. The rule was extended in 1793 so as to prohibit all neutral trade with the colonies and coast towns of the enemy which had not been open before the war. The principle upon which the English decision proceeded was stated as follows by Lord Stowell in the *Immanuel*:<sup>2</sup>—

'Upon the interruption of a war, what are the rights of belligerents and neutrals respectively regarding [colonies]? It is an indubitable right of the belligerent to possess himself of such places, as of any other possession of his enemy. This is

<sup>1</sup> Kent's *Commentaries on International Law* (ed. by Abdy) 2nd ed. p. 205.

<sup>2</sup> 2 C. Rob. at p. 199 (1799).

his common right, but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea: such colonies are dependent for their existence, as colonies, on foreign supplies; if they cannot be supplied and defended, they must fall to the belligerent of course—and if the belligerent chooses to direct his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it: he can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent, and to say, “True it is you have, by force of arms, forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and by sharing its benefits prevent its progress.”

6. On behalf of the United States Mr. Monroe, in a letter to Lord Mulgrave of September 23, 1805, insisted that neutrals were entitled to trade, with the exception of blockades and contraband, to and between all ports of the enemy, and in all articles, although the trade should not have been opened to them in time of peace. This view has upon the whole prevailed among American statesmen and jurists, though Chancellor Kent has intimated a different opinion.<sup>1</sup>

The question is not free from difficulty, and the answer depends upon the familiar compromise between neutral and belligerent rights. Phillimore<sup>2</sup> usefully distinguishes the following cases:—

- (1) The carrying on by the neutral of the trade between the belligerent mother-country and the colonies.
- (2) The carrying on the coasting trade of the belligerent—such trade being confined in time of peace to the belligerent subjects.
- (3) The carrying on the trade by a neutral from a port in his own country to a port of the colony of the belligerent.
- (4) The carrying on by a neutral of a trade between the ports of the belligerent, but with a cargo from the neutral's own country.

In the first two cases the view seems reasonable that a neutral accepting a licence to trade in effect incorporates

<sup>1</sup> Kent, *Com.* vol. i. pp. 90-92.

<sup>2</sup> *International Law*, vol. iii. p. 299.



Rule of War of  
1756.

himself in the enemy fleet, and may fairly be treated as belligerent. As Mr. Justice Story expressed it: 'The property is considered *pro hac vice* as enemy's property, as so completely identified with his interests as to acquire a hostile character.' English lawyers will find little to criticise in the conclusion of the same high American authority on the general question. 'The British,' he continues, 'have extended the doctrine to all intercourse with the colony, even from or to a neutral country, and herein it seems to me they have abused the rule. This, at present, appears to me to be the proper limits of the rule, as to the colonial trade [with the mother-country] and the coasting trade; and the rule of 1756 (as it was at that time applied) seems to me well founded; but its late extension is reprehensible.' In fact, the extension with which Mr. Justice Story quarrels can only be defended on the assumption that the rights of neutrals are confined to trade which they possessed before the outbreak of war—an assumption quite impossible to reconcile with many facts which are not in question.<sup>1</sup>

Continuous  
Voyage.

7. The British application of the rule in 1793 was rendered still more severe by what was known as the doctrine of continuous voyage. Orders in Council had so far relaxed as to allow the importation of the produce of the enemy's colonies into a neutral country, and its exportation thence in a neutral bottom. This led to colourable evasions by neutral shippers, and the question was much discussed by what evidence the *bona fides* of a transshipment was to be established. Lord Stowell held that the landing of the goods and the payment of duties in a neutral harbour was evidence enough of a *bona fide* importation: 'If these criteria are not to be resorted to, I should be at a loss to know what should be the test; and I am strongly disposed to hold that it would be sufficient that the goods should be landed and the duties paid.'<sup>2</sup>

The real issue in such cases was well shown in a short conversation between the Court and counsel in the *Polly*<sup>3</sup> :—

*Court.*—'Is it contended that an American might not

<sup>1</sup> The extension of the rule in 1793 is condemned by Westlake, *International Law*, Part II. p. 255, and by Hall, 6th ed. p. 634.

<sup>2</sup> The *Polly*, 2 C. Rob. at p. 369 (1800).

<sup>3</sup> At p. 365.

purchase articles of this nature [in Spain] and import them, *bona fide*, to America on his own account, and afterwards export them?' Continuous Voyage.

It was answered, No; that was not contended; but that the truth and reality of the importation for his own account was the point in question; that all the circumstances in the case pointed to a near connection with Spanish interests; and that no proof was brought of the payment of the duties in America, nor that the transaction was in any way conducted like a *bona fide* importation for the American market.

In the later case of the *William*,<sup>1</sup> the test was stated by the Court of Appeal to be more general.

'Let it be supposed,' the judgment ran,<sup>2</sup> 'that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? . . . If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have been ended. That these acts have been attended with trouble and expense cannot alter their quality or effect. The trouble and expense may weigh as circumstances of evidence, to show the purpose for which the acts were done; but if the evasive purpose be admitted or proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it.'

The Rule of War of 1756 will arise less frequently now that the colonial system of Europe has chosen the better part of unrestricted intercourse, but it would be very premature to suppose that it has disappeared from the existing rules of international law. The doctrine of continuous voyage became very prominent in the discussions at the Conference of London in 1908 and 1909, and the compromise on the subject which was then arrived at will be found fully set out later in the chapter on Contraband of War.

<sup>1</sup> 5 C. Rob. p. 385 (1806).

<sup>2</sup> At p. 395.



## CHAPTER III

### THE INTERNATIONAL PRIZE COURT AND THE DECLARATION OF LONDON

The Interna-  
tional Prize  
Court.

1. THE Second Peace Conference at the Hague in 1907 was marked by a new departure of the highest importance in the history of naval prize law. Hitherto, as we have seen, the only tribunal competent to pronounce a decision upon any question arising out of a capture in naval warfare was a tribunal of the belligerent captor established in his territory and presided over by his judges: the sacred character of the right of sovereignty being held to override any inconvenience which might arise from the fact that the captor was a judge in his own cause, and there being no alternative tribunal which had a better claim to exercise jurisdiction. The belligerent, in fact, was merely given an opportunity of applying a more judicial mind to the hasty acts of his naval officers.

2. At the Second Peace Conference<sup>1</sup> an attempt was made to remedy this state of affairs by the establishment of an International Court of Appeal, to which neutrals and, in certain cases, belligerents might have recourse when dissatisfied with the decisions of the prize courts of the captor. The original jurisdiction of the national courts was of course preserved,<sup>2</sup> and also, where so provided by the municipal law, the jurisdiction of one, but not more than one, national court of appeal:<sup>3</sup> provided that the national court or courts delivered final judgment within two years from the date of the capture.<sup>4</sup> But after judgment by the national court of first instance or of appeal, or in default of final judgment within two years, it was provided that the case might be brought before an International Court—

(1) ‘*When the judgment of the national prize courts affects*

<sup>1</sup> Misc., No. 6 (1908), Cd. 4175, p. 101.

<sup>2</sup> Convention XII. of 1907, Art. 2, Cd. 4175, p. 101.

<sup>3</sup> *Ibid.*, Art. 6.

<sup>4</sup> *Ibid.*, Art. 6.

*the property of a neutral power or individual; (2) when the judgment affects enemy property and relates to* International Prize Court.

- (a) *Cargo on board a neutral ship;*
- (b) *An enemy ship captured in the territorial waters of a neutral power, when that power has not made the capture the subject of a diplomatic claim;*
- (c) *A claim based upon the allegation that the seizure has been effected in violation, either of a conventional stipulation in force between the belligerent powers, or of an enactment issued by the belligerent captor.<sup>1</sup>*

The neutral power may appeal where neutral property or violation of neutral territory is concerned, the neutral individual (unless forbidden by his Government) where his own property is concerned, and the enemy subject where his own property is concerned, except in the case of alleged violation of neutral territory.<sup>2</sup> Where the question to be decided is covered by a treaty, the Court is directed to have regard to such treaty; and in other cases 'the Court shall apply the rules of international law. If no generally recognised rule exists, the Court shall give judgment in accordance with the general principles of justice and equity.' A failure to comply with the procedure prescribed by the belligerent captor may be disregarded if the Court is of opinion that its consequences are unjust and inequitable.<sup>3</sup>

The International Court was to be given power to order restitution, and to assess damages and compensation: and it was provided that there should be an appeal to it only as to damages in cases where the national court had declared the capture invalid.<sup>4</sup>

3. The Court was to consist of fifteen judges (nine constituting a quorum) and deputy judges, appointed for six years by the contracting powers, and eligible for reappointment:<sup>5</sup> the judges appointed by Germany, the United States, Austria-Hungary, France, Great Britain, Italy, Japan and Russia to be always summoned, and the judges and deputy judges appointed by the other powers, who were numerous, to be summoned by rota,<sup>6</sup> with a right in any belligerent to be represented in all cases in which his interests are concerned.<sup>7</sup>

<sup>1</sup> Art. 3.

<sup>2</sup> Art. 4.

<sup>3</sup> Art. 7.

<sup>4</sup> Art. 8.

<sup>5</sup> Arts. 10, 11, 12.

<sup>6</sup> Art. 15.

<sup>7</sup> Art. 16.



The International  
Prize Court.

Detailed provision was made as to procedure,<sup>1</sup> place of sitting, staff, and the like : and each party was to pay its own costs, while the losing party was to pay in addition the costs of the trial and one per cent. of the value of the subject-matter of the case as a contribution to the general expenses of the Court, the amount to be fixed in the judgment of the Court.<sup>2</sup> An individual appealing was to give security for the sums he might be liable to pay.<sup>3</sup>

4. Finally it was agreed that the Convention should only apply as of right where the belligerent powers were all parties to it, that only a contracting power or a subject of a contracting power should have the right to appeal,<sup>4</sup> and that the deposit of ratifications should take place so soon as the powers ready to ratify furnished the necessary quorum of nine judges and nine deputy judges,<sup>5</sup> with leave to other powers to accede subsequently to the Convention. The Convention was to come into force six months from such deposit of ratifications :<sup>6</sup> and was to continue in force for twelve years, with a tacit prolongation for six years if not denounced, denunciation being only operative in respect of the denouncing power.<sup>7</sup> Certain difficulties have stood in the way of the prompt ratification of this Convention. In Great Britain, parliamentary sanction is necessary, as it involves a limitation upon the jurisdiction of the courts and the absolute sovereignty of the Crown. This sanction will be granted if and when the Naval Prize Bill 1910 becomes law.<sup>8</sup> In the United States, the difficulty is more serious, as the written constitution of that country precludes any right of appeal from the Supreme Court. The United States delegates, at the Conference of London to which we will shortly refer, invited the delegates to accept the principle 'that as regards countries where such constitutional difficulties arose, all proceedings in the International Prize Court should be treated as a rehearing of the case *de novo* in the form of an action for compensation, whereby the validity of the judgments of the national courts would remain unaffected, whilst the duty of carrying out a decision of the International Court ordering payment of compensation, would fall upon the Government concerned.' On such a question the Conference of London had no authority : but to facilitate

<sup>1</sup> Arts. 19 to 45.

<sup>2</sup> Art. 46.

<sup>3</sup> Art. 46.

<sup>4</sup> Art. 51.

<sup>5</sup> Art. 52.

<sup>6</sup> Art. 54.

<sup>7</sup> Art. 55.

<sup>8</sup> See Appendix for the text of this Bill.

the adhesion of the United States to the Prize Court Convention, the delegates expressed a wish (*vœu*), by which they agreed to call the attention of their Governments to the advantage of giving power to states so situated to deposit their ratifications with a reservation 'to the effect that resort to the International Prize Court, in respect of the decisions of their National Tribunals, shall take the form of a direct claim for compensation, provided always that the effect of this reservation shall not be such as to impair the rights secured under the said Convention, either to individuals or to their Governments, and that the terms of the reservation shall form the subject of a subsequent understanding between the powers signatory of that Convention.' No such understanding has as yet been reached. But apart from these questions of constitutional difficulty, the general acceptance of the Convention was delayed by the provision already referred to, that the International Prize Court was to apply the rules of international law, and if no generally recognised rule existed, should give judgment in accordance with the general principles of justice and equity.<sup>1</sup> At the Conference at the Hague in 1907, a certain measure of agreement was arrived at on some questions relative to maritime war, but a large number of important questions were either not discussed, or, if discussed, revealed great divergencies of opinion. Several powers intimated that unless such uncertainty could be removed, they would be unable to ratify the Convention, and in these circumstances a Conference of the chief maritime powers (to whom was added the Netherlands) met at London in 1908, at the invitation of Great Britain, with the object of arriving, if possible, at an understanding as to the rules of international law applicable to all subjects which would come before the International Prize Court. This Conference was a more practical body than those assembled at the Hague, as its members were restricted to the powers whose interests were mainly affected, and its procedure was organised on more business-like lines. The powers represented drew up preliminary memoranda, intended to set out their views of the existing law: from these memoranda the principles on which there seemed to be some approach to a general agreement were extracted so far as possible, and set out as 'bases of discussion'; and as the

The International  
Prize Court.

The Conference  
of London.

<sup>1</sup> See p. 223, *supra*.



The Declaration  
of London.

result of prolonged discussion a code of rules was drawn up of a more complete and elaborate character than anything hitherto attempted in the region of international law ; the Articles of which are set out in the following chapters. These Articles are for the greater part an exposition of existing law, though occasionally they constitute a declaration of new law. As they were the result in many cases of a compromise, concessions by one nation being conditional on concessions made by others, it was agreed<sup>1</sup> that they must be ratified, if at all, as a whole.

5. It will be seen that though elaborate they are not by any means an entirely complete code of naval prize law, and in their interpretation difficulties will sometimes arise as to whether particular rules are exclusive of, or may be supplemented by, national case law : but they mark a very important advance towards the establishment of a written code of international law. They have not yet been ratified by the powers concerned, and there are constitutional difficulties, as we have seen, in the way of their ratification by the United States ; but even if they are never ratified, the fact that they are the considered conclusions of a chosen body of the jurists, statesmen and sailors of the chief maritime countries of the world, will give them an authority which cannot in the future be without influence upon the decisions of any international court or arbitrator. The possibility, however, must not be overlooked that a refusal by any power to ratify may lead to an abandonment of all concessions made, and a more determined insistence than ever by each power upon its own point of view. It is to be noted that the official commentary or report which accompanies the Articles of the Declaration is treated by continental practice as an authoritative explanation of its terms, and consequently would, in all probability, be so treated by an international court.<sup>2</sup>

<sup>1</sup> Art. 65.

<sup>2</sup> Hall, 6th ed. p. 637 ; *Parl. Papers*, Misc., No. 4 (1909), p. 94. There is some controversy on this point, but the statement in the text appears to be correct. It is the view taken by the British delegates, and is supported by the words of the Report itself.

## CHAPTER IV

### THE LAW OF CONTRABAND

1. 'IL est considéré de l'aveu de toutes les nations de l'Europe,' *Contraband.* says de Martens,<sup>1</sup> 'comme contraire à la neutralité de permettre à nos sujets de transporter vers les ports de l'une ou des deux puissances belligérantes de certaines marchandises qu'on désigne sous le nom de contrabande de guerre.' The observation, for reasons which have been stated, requires qualification.<sup>2</sup> It is not a breach of neutrality for a neutral state to permit such traffic, but the belligerent Government is left to confront, and exact reparation from, the offending neutral individual. Nor is the act of carrying contraband in itself illegal by English law, unless prohibited by proclamation or order in council;<sup>3</sup> and those states which have in fact prohibited the export of contraband, as the Netherlands and Brazil during the Spanish-American War, and Sweden during the Russo-Japanese War, are justly regarded as having shown an excess of caution which goes beyond neutral duty.<sup>4</sup> Contraband property was defined in the British Memorandum drawn up for the purposes of the London Conference, as 'neutral property on board ship on the high seas or in the territorial waters of either belligerent which (1) is by nature capable of being used to assist in, and (2) is on its way to assist in, the naval or military operations of the enemy.'

2. Grotius<sup>5</sup> divided all articles which may be the subject of neutral trade into three classes : Classes of  
Contraband

1. Articles, such as arms, which are useful only for war.

<sup>1</sup> *Précis du Droit des gens*, lib. viii. ch. vii. § 318.

<sup>2</sup> See p. 215, *supra*; and cf. Ortolan, *Dép. de la Mer*, ii. 199. 'Il ne s'agit pas d'actes d'un gouvernement qui romprait la neutralité, mais d'actes de particuliers qui exercent leur trafic.'

<sup>3</sup> *Ex parte Chavasse*, in *re* Grazebrook, 34, L.J. (Bkey.), 17. *The Helen*, 1, A. and E. 1.

<sup>4</sup> Westlake, *International Law*, Part II. p. 258.

<sup>5</sup> Lib. iii. c. 1. § 5.



Classes of Contraband.

2. Things which merely serve for pleasure, and have no warlike use.
3. Things *ancipitis usus*, i.e., which may be used equally for peace and war, e.g., money, provisions, ships and tackle.

It is clear, he observes, that articles falling under class (1) are contraband, and equally clear that those under (2) are innocent. It is under the third head that difficulties mainly arise. In such cases, he observes, 'Distinguendus erit belli status.'<sup>1</sup> And to the same effect a very famous writer on contraband, Heineccius:<sup>2</sup> 'Sometimes things of the very smallest importance become all important, if the enemy is distressed for the want of them, and unable to procure a supply from any other source.'

3. The judgment of the court in the *Peterhoff*,<sup>3</sup> an American case, restated the Grotian arrangement: 'A strictly accurate and satisfactory classification is perhaps impracticable: but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes the first consists of articles manufactured, and primarily and ordinarily used, for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.'

History of Classification.

4. A long series of treaties, declarations, proclamations and decrees<sup>4</sup> between and by the chief civilised nations of the world shows the gradual development of the practice as to contraband. There was a tendency in the earlier periods for

<sup>1</sup> A distinction must be drawn depending on the character of the war.

<sup>2</sup> Magnum sane aliquando momentum in bellis habent res minimi momenti, si hostis laboret inopia, nec verum istarum aliunde copia sit' (*De Jur. Prin. Civ. Com.* §12).

<sup>3</sup> 5. Wall., p. 58.

<sup>4</sup> Summarised by Atherley Jones, *Commerce in War*, pp. 8-55.

powers to take upon themselves the liability to restrain their own subjects from the traffic in prohibited goods.<sup>1</sup> The method adopted was almost always that of close enumeration rather than general definition of contraband articles, and the lists varied according to the interests at the time of the nations concerned.

History of Classification.

5. The distinction between absolute contraband (*i.e.*, property which can be confiscated if on its way to enemy territory) and conditional contraband (*i.e.*, property which can be confiscated only if destined for the armed forces of the enemy), is not at first clearly drawn, the attention of treaty-makers being concentrated upon drawing up lists of things which in no circumstances are to be supplied to enemies of the parties. It was recognised at an early period, and repeatedly laid down, that commerce with a place invested or blockaded stands on a different footing from trade in contraband, but the first instance of a distinction being suggested between destination to enemy country and destination to enemy armed forces, is found in an American circular of 1777,<sup>2</sup> in which the right to seize neutral vessels is limited to those 'having on board soldiers, arms, munitions, provisions and other contraband intended for the British army and its war ships,' though it is not clear that such a distinction was clearly contemplated in this case, as the intention would no doubt be presumed if any enemy port were the destination in the case of soldiers, arms and munitions, and the position of provisions was doubtful, they having frequently been included in lists of absolute contraband.<sup>3</sup>

Absolute and Conditional.

6. There is a recognition of a similar distinction in a treaty of 1806,<sup>4</sup> between Great Britain and the United States, when tar and pitch were declared not contraband, unless going to a port of naval equipment, in which case they were to be not confiscated but subject to a right of pre-emption.

The distinction occurs again in a decree issued by the Peruvian Government in 1866,<sup>5</sup> by which coal was declared contraband if destined for the use of Spanish ships of war,

<sup>1</sup> *e.g.* England, Spain and Burgundy in 1604, England and the Low Countries in 1625, England and Denmark in 1670.

<sup>2</sup> Atherley Jones, *Commerce in War*, p. 23.

<sup>3</sup> Great Britain, in 1776, declared all ships trading to the American colonies lawful prize (Atherley Jones, *Ibid.*, p. 24).

<sup>4</sup> Atherley Jones, *Ibid.*, p. 32.

<sup>5</sup> Atherley Jones, *Ibid.*, p. 42.



Absolute and Conditional Contraband.

and in a treaty made between the Argentine Republic and Peru in 1874, which specified as contraband 'victuals destined for hostile troops or fleets'

7. In the war between Russia and Turkey in 1877, Russia included in her list of contraband 'tous les objets destinés aux troupes de terre ou de mer,' which was, if 'destinés' meant 'destined for' and not 'adapted for,' a complete change of front on the part of that country, which had hitherto pursued the policy of restricting contraband to munitions of war, and a striking illustration of the effect produced upon a nation which having been neutral finds itself a belligerent.<sup>1</sup> Even apart from this the list contained a number of articles classed as absolute contraband (such as spades), which went far beyond anything previously contemplated, and violated the principle that absolute contraband must be articles having only a war-like use.

8. France when at war with China in 1885 found herself unable to resist a similar temptation. Her treaties up to the year 1856 had given evidence of a firm determination to restrict contraband to munitions of war, and to keep provisions on the free list; but in this year the French Government declared rice contraband if destined to Chinese ports. The British Government protested on the ground that though provisions might be contraband if consigned to a fleet, or to a port where a fleet might be lying, they were not absolute contraband; and the French Government defended their attitude by claiming that it is for the belligerent to decide the question of what is contraband, and by laying stress upon the importance of rice, not only to Chinese armies but to the Chinese population.<sup>2</sup>

<sup>1</sup> Atherley Jones, *Commerce in War*, p. 44.

<sup>2</sup> *Ibid.*, p. 45. *Parl. Papers*, Misc., No. 2, 1911, where the whole correspondence is set out. France quoted a statement by the Attorney-General in 1854 that one of the categories of contraband is 'Articles which may be of indirect use in war, by permitting a continuation of hostilities, such as provisions'; an official letter of Lord Malmesbury in 1859 warning British subjects 'that if they convey for the use of either belligerent articles which are held to be contraband of war, and if their property be seized by either belligerent, Her Majesty's Government will not take upon itself to intervene on their behalf . . . the prize court of the country which has made the seizure is competent to decide the case'; and a passage from a letter of 'Historicus' (officially approved by the Attorney-General in 1870), 'It is not for a neutral state to define what is or what is not contraband of war. It appertains alone to the prize court of the belligerent which has effected the capture to take cognizance of that question.' The British

9. In the British Manual of Naval Prize Law of 1888, the distinction was fully elaborated, naval stores being included in the list of absolute, and provisions, money, coals and horses in the list of conditional contraband.

Absolute and  
Conditional Con-  
traband.

Spain, which had in 1866 declared coal contraband when it found it convenient to do so (with a proviso that the declaration was not to be taken for a precedent), claimed in 1898 the right of determining anything to be contraband: Russia, in 1900, included 'in general, all other articles directly intended for war on land or sea, if they are being conveyed on behalf of, or are destined for, the enemy,' adding the explanation,<sup>1</sup> 'By the expression "destined for the enemy," is understood conveying to his fleet, to one of his ports, or even to a neutral port, if the latter is shown by clear and indisputable evidence to be simply an intermediate station on the way to the enemy, the latter being really the ultimate destination.'

10. By the Japanese notification of 1904, during the war with Russia, two lists were set out: the first of goods intended solely for use in war and to be 'regarded as contraband when passing through or destined for enemy's use'; the second, which included food, drink, horses, coal, gold and silver, and telegraph, telephone and railway materials to be 'regarded as contraband of war when destined for enemy's army or navy, or in such cases where, being goods arriving at enemy's territory, there is reason to believe they are intended for use of enemy's army or navy.'

11. The Russian Government in the same war spread the net very wide indeed.<sup>2</sup> Their list of contraband included such articles *ancipitis usus* as barbed wire, harness, pots and pans, coal, naphtha, alcohol and every kind of fuel, telegraph, telephone and railroad materials, and 'generally everything intended for warfare by sea or land, as well as rice, provisions and horses, beasts of burthen and others which may be used for a warlike purpose, if they are transported for the account

reply admitted that it was for the belligerent prize court to decide the legality of seizures, but subject to ulterior diplomatic action if the Court did not act in accordance with the principles of international law, and the protest against the treatment of rice as contraband was maintained. But the war ended shortly afterwards and the dispute went no further; large shipments of rice having been in the meanwhile stopped through fear of capture.

<sup>1</sup> Atherley Jones, *Commerce in War*, p. 47.

<sup>2</sup> *Ibid.*, pp. 47, 48.



Absolute and  
Conditional Con-  
traband.

of, or are destined for, the enemy' ('pour le compte ou à destination de l'ennemi'). In addition, instructions to Russian commanders included 'all kinds of grain, fish, fish products, beans, bean oil and oil-cakes,' and also, specifically, cotton.

The words used were, it is to be noted, 'pour le compte ou à destination de l'ennemi;' which if 'l'ennemi' were strictly construed as meaning any enemy subject, would have in effect put everything into the list of absolute contraband. But in the cases of the *Arabia* and the *Chalcas*,<sup>1</sup> the Supreme Prize Court at St. Petersburg laid it down that 'the articles enumerated in section 10 of the said Article of the rules are deemed to be contraband of war only if transported on the account of, or destined for, the enemy, *i.e.*, when transported to the enemy's Government, contractors, army, navy, fortresses or naval harbours, and not for private individuals, subjects of the enemy's country, and more especially neutral Governments or private individuals.'

This interpretation of the word enemy in this connection is in accordance with the British rule as to conditional contraband: and it is important, in view of certain doubts which have been expressed on a clause of the Declaration of London, which is dealt with later.

Thus the distinction between absolute and conditional contraband was very late in making its appearance in state documents; and in 1674, Sir Leoline Jenkins, in a case where Spain had seized British pitch and tar, declared it his opinion<sup>2</sup> 'that nothing ought to be judged contraband . . . but what is directly and immediately subservient to the use of war, except it be in the case of besieged places or of a general certification by Spain to all the world that they will condemn all the pitch and tar they meet with.'

Decisions of Prize  
Courts.

12. But the British prize courts have from the latter part of the eighteenth century and particularly since the case of the *Jonge Margaretha*,<sup>3</sup> consistently laid stress upon the distinction. In that case Sir W. Scott said:—

'But the most important distinction is whether the articles were intended for the ordinary uses of life, or even for mercantile ships' use, or whether they were going with a highly probable

<sup>1</sup> Atherley Jones, *Commerce in War*, pp. 88, *Times*, Oct. 11, 1904.

<sup>2</sup> Hall, 6th ed. p. 639.

<sup>3</sup> 1 C. Rob. 188 (1798).

destination to military use. Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going is not an irrational test. If the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. On the contrary, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place.<sup>1</sup>

Decisions of Prize Courts.

The British rule was followed by the American Courts<sup>2</sup> and the Russian Court, as we have seen, recognised the distinction in the case of the *Chalcas* and the *Arabia*.<sup>3</sup>

13. With regard to the question what articles are contraband, the practice has been conflicting and varied. We may, with Ortolan,<sup>4</sup> put arms and munitions of war on one side as being always and at all times contraband.

Classification of Articles.

Horses have been specifically included in the list in treaties on a large number of occasions, being accounted absolute contraband, though clearly *ancipitis usus*: money has been more leniently dealt with, and on several occasions expressly excluded; ships have been occasionally included, though usually not mentioned; naval stores have been frequently excluded, though more often included, and, on two occasions, included as conditional contraband; and provisions, though included in some of the seventeenth-century treaties, and in an American Declaration of 1861, were repeatedly

<sup>1</sup> See also the *Endraght*, 1 C. Rob. 21 (1798); the *Haabet*, 2 C. Rob. at p. 182 (1799); the *Neptunus*, 3 C. Rob. 108 (1800); the *Edward*, 4 C. Rob. 68 (1801); the *Nostra Signora de Begona*, 5 C. Rob. 97 (1804); the *Charlotte*, 5 C. Rob. 305 (1804); the *Zelden Rust*, 6 C. Rob. 93 (1805). At one time there was a tendency to regard as excepted from the list of contraband articles which were the native produce of the country from which they came, or at the least to treat them as subject not to confiscation but to pre-emption, but this rule has for all practical purposes disappeared. See the *Staat Embden*, 1 C. Rob. 26 (1798); the *Jonge Margaretha*, 1 C. Rob. 188 (1798); the *Apollo*, 4 C. Rob. 158 (1802); the *Jonge Pieter*, 4 C. Rob. 162 (1781).

<sup>2</sup> The *Commercen*, 1 Wheat. 382 (1814); *Maissonaire v. Keating*, 2 Gall., 325 (1815); the *Peterhoff* (1866), 5 Wall., 28; *United States v. Dickelman* (1875), 92, U.S.Rep. 520; the *Benito Estenger* (1900), 176 U.S.Rep. 568; the *Junio* (1903), 38 Ct. Cl. (U.S.), 465; the *Bird* (1903), 38, Ct. Cl. (U.S.), 228.

<sup>3</sup> Atherley Jones, *Commerce in War*, pp. 88, 90; see p. 232, *supra*.

<sup>4</sup> Vol. ii. p. 190.



excluded in express terms, but treated by France in 1885 as absolute contraband.

National Practice:  
Great Britain.

14. National practice has varied often according to the exigencies of the moment. England, in the seventeenth century, declined on general principles to recognise pitch or tar as contraband, while claiming for a belligerent the right to draw up a list at the beginning of a war according to circumstances; but at the end of the eighteenth century, being a belligerent, put naval stores such as tar, pitch, hemp and masts in the list of absolute contraband.<sup>1</sup> Horses she was treating as absolute contraband in treaties from 1656 to 1810, but in the Admiralty Manual of 1888 they appear as conditional only, along with money, telegraph and railway material and coals: and provisions, treated as absolute contraband in 1654<sup>2</sup> and 1793, and thereafter on many occasions expressly declared to be free, have been dealt with as on principle included in the conditional list, in accordance with the judgment in the *Jonge Margaretha*.<sup>3</sup> In that case, cheeses sent by a Papenberg merchant from Amsterdam to Brest, where a considerable French fleet was stationed, were condemned by Sir W. Scott, who observed:—

‘I take the modern established rule to be this, that generally provisions are not contraband, but may become so under circumstances arising out of the peculiar situation of the war, or the condition of the parties engaged in it.’

British authorities, as has been seen, could be readily multiplied. In the *Ranger*,<sup>4</sup> a cargo of biscuit and flour had been put on board an American ship from the public stores at Bordeaux, and was bound for Cadiz, though ostensibly documented for Ville Real in Portugal. Sir W. Scott condemned the vessel, and his judgment is noticeable as suggesting that a claim might legally be made to condemn all provisions, whether intended for military consumption or not:—

‘This is a very gross attempt to abuse the instructions which were issued for the supply of provisions to Spain. It must always be

<sup>1</sup> The *Maria*, 1 C. Rob. at p. 371 *a* (1799); the *Charlotte*, 5 C. Rob. 305 (1804); Admiralty Manual, 1888.

<sup>2</sup> In a treaty with Holland.

<sup>3</sup> 1 C. Rob. 189 (1798).

<sup>4</sup> 6 C. Rob. 125 (1805).

remembered that this Government might have availed itself of the Great Britain. interior distress of the enemy's country as an instrument of war: it did not, however, but humanely permitted cargoes of grain to be carried, without molestation, for the relief of the necessities of famine under which Spain had for some time laboured. It was natural to expect that a grant made with so much liberality would have been used with the most delicate honour and good faith both by Spain and her allies.<sup>1</sup>

Acting on this view of her rights, England had seized, in 1793, all vessels bearing provisions which were destined for French ports, and a similar claim was made by France with regard to rice in the war with China in 1885. But such claims are not consistent with the admitted rights of neutrals. The interference with neutral trade is limited by belligerent necessity, and to impose the pressure of starvation upon a non-combatant population is not, according to modern ideas, a permissible operation of war.

15. The United States, in their treaties, have been fairly United States. consistent in regarding horses as absolute contraband, but less consistent in their treatment of naval stores, which have been more often excluded than included, though it has been frequently conceded that these and shipbuilding materials are contraband.<sup>1</sup>

With regard to provisions, the United States joined the armed neutrality of 1780, which limited contraband strictly to munitions of war; but this was hardly an expression of the country's policy, for it was laid down in various cases<sup>2</sup> that provisions are conditional contraband, in spite of treaties which dealt with them as entirely free. In their war with Spain in 1898, the United States made provisions conditional contraband.

16. French treaties till the nineteenth century steadily in- France cluded horses as absolute contraband, and then ceased to mention them; occasionally included naval stores, but more usually excepted them or left them unmentioned, and practically always put provisions on the free list. By French practice, ship timber and naval stores are not contraband,<sup>3</sup>

<sup>1</sup> Woolsey, *International Law*, 5th ed. p. 332; Hall, 6th ed. p. 646 *et seq.*

<sup>2</sup> *Maissenaire v. Keating* (1815), 11 Gall, 335; the *Commercen* (1814), 1 Wheaton, 387; the *Benito Estenger*, 176 U.S. Rep. p. 573 (1900).

<sup>3</sup> Hall, 6th ed. p. 655.



France. and a similar principle was adopted in 1859 and 1870 in regard to coal, which England in 1870 regarded as in the conditional list and Germany claimed to be absolute contraband. No belief in consistency, however, prevented France in 1885 from claiming to treat rice as absolute contraband as already mentioned.

Prussia. 17. Prussia was one of the parties who joined the Armed Neutrality of 1780, and was at that time anxious for the strictest limitation of belligerent rights; but, as we have seen, her view had entirely changed in 1870 with regard to coal, and a prominent Prussian jurist, Heineccius, in 1721,<sup>1</sup> regarded naval stores and provisions of every kind as absolute contraband.

Russia. 18. Russia, throughout her history, has consistently claimed that horses are always free, and her tendency was always towards a strict limitation of the list of contraband. She was the leading spirit in the Armed Neutralities, and she protested firmly in 1884 against the inclusion of coal. Nevertheless, in her war with Japan in 1904, in her list of contraband (no distinction being expressly made between absolute and conditional) were found coal, telegraph, telephone and railway materials, and 'all objects intended for war by sea or land, including rice, provisions and horses,' and in that war she even claimed to include raw cotton,<sup>2</sup> and declared provisions absolute contraband, till induced by a protest from Great Britain, to place them in the conditional list. As we have seen, however, the distinction between absolute and conditional contraband was, in fact, recognised by the Russian Courts. Nor was Russia's attitude at the Conference of London at all in accord with her traditional anxiety to guard the rights of neutrals, for she proposed to include in the list of absolute contraband many articles which should be and were ultimately placed only on the conditional list.

The *Allanton*. 19. In the case of the *Allanton* in 1904,<sup>3</sup> the Russian prize court condemned a British vessel proceeding with Japanese coal from Japan to British consignees in Singapore, the grounds of condemnation being irregularities in the papers, evidence of the previous conveyance of contraband to Japan,

<sup>1</sup> Hall, 6th ed. p. 641.

<sup>2</sup> See p. 232, *supra*.

<sup>3</sup> Shipping Gazette, June 24, 1904; Atherley Jones, *Commerce in War*, pp. 83, 84.

and 'the chartering of the steamer for her second voyage by a Japanese trading company and the discovery on board of a full cargo of coal constituting contraband if the real destination of the steamer was not Singapore but an enemy's port or even the enemy's fleet.' This decision, indefensible on any ground, was reversed by the Supreme Court at St. Petersburg, for the very proper reasons that there was nothing to prove that the cargo was intended for conveyance to an enemy port, and that neutral vessels cannot be confiscated merely because they have on a previous occasion carried contraband to the enemy: but it was held on grounds of doubtful validity, that there had been sufficient cause for suspicion to justify detention.

20. At the Second Peace Conference at the Hague in 1907, a proposal was made tentatively by Great Britain that contraband should be entirely abolished, but the suggestion was not received with sufficient favour to lead to there being any prospect of its adoption. More consideration was given to a proposal made by the United States, that the right of seizure for all but absolute contraband should be given up;<sup>1</sup> and the British Government went into the Conference at London in 1908 prepared, if it were found practicable, to make an agreement to that effect.<sup>2</sup> Even on this, however, it was found impossible to arrive at anything approaching unanimity, and the suggestion was abandoned and attention concentrated upon an attempt to secure some reasonable degree of certainty as to what articles belonged to each class of contraband, and what were to be considered entirely free.

21. Faced with the confusion and uncertainty prevailing on these points, a committee of the Second Peace Conference drew up provisionally a list of articles to be considered absolute contraband, and this list was adopted by the Conference of London as the best available compromise between the views of those powers who wished to enlarge it and of those who wished to limit it still further. Great Britain and Japan tried to secure the elimination from it of horses and mules: Germany and Russia desired to include railway, telegraph, telephone and aeronautical material: France,

<sup>1</sup> This had been proposed in 1896 by the Institute of International Law.

<sup>2</sup> They were supported in this by Austria, Spain and the Netherlands.



The Declaration  
of London.

telegraph and aeronautical materials: Russia, in addition to the above, provisions of a character adapted to military consumption, gold and silver and paper money of every kind.

Absolute Contra-  
band.

22. This list is set out in Article 22 of the Declaration as follows:—

*The following articles may, without notice,<sup>1</sup> be treated as contraband of war under the name of absolute contraband:—*

1. *Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.*
2. *Projectiles, charges and cartridges of all kinds, and their distinctive component parts.*
3. *Powder and explosives specially prepared for use in war.*
4. *Gun mountings, limber-boxes, limbers, military waggons, field forges, and their distinctive component parts.*
5. *Clothing and equipment of a distinctively military character.*
6. *All kinds of harness of a distinctively military character.*
7. *Saddle, draught and pack animals suitable for use in war.*
8. *Articles of camp equipment and their distinctive component parts.*
9. *Armour plates.*
10. *War ships, including boats and their distinctive component parts of such a nature that they can only be used on a vessel of war.*
11. *Implements and apparatus designed exclusively for the manufacture or repair of arms, or war material for use on land or sea.*

23. The above list was recognised as practically including everything at present known which can be described as exclusively adapted for use in war: and indeed it went further than this and included, notably in the case of horses and mules, things *ancipitis usus*. But in view of the possibility

<sup>1</sup> 'De plein droit.'

of further discoveries and inventions, several countries were anxious to retain a power of adding to the list; and the claim which, as we have seen, had been made by some belligerents, that a belligerent nation has the right to declare what it pleases to be contraband, is reflected, but with an important reservation, in Article 23 :—

Absolute Contraband.

*'Articles (les objets et matériaux) exclusively used for war may be added to the list of absolute contraband by a declaration, which must be notified. Such notification must be addressed to the Governments of other powers, or to their representatives accredited to the power making the declaration. A notification made after the outbreak of hostilities is addressed only to neutral powers.'*

Any article so notified will be subject, of course, to the ultimate decision of the International Prize Court on the question whether it is or is not an article 'exclusively used for war.' If it is not, the notification will be invalid.

24. To justify condemnation, contraband goods must have an enemy destination; that is to say, a destination to the enemy's fleet, or to some place in territory belonging to or occupied by the enemy. During the American Civil War this rule was modified by the American courts in a manner which roused the most acute controversy. Acting upon a supposed analogy to Lord Stowell's doctrine of continuous voyage, which has been considered in connection with the Rule of War of 1756,<sup>1</sup> the American judges held in the *Bermuda*<sup>2</sup> :—

Destination :  
Continuous  
Voyage.

- (1) That voyages from neutral ports with cargo intended for belligerent ports are not protected in respect of seizure, either of ship or cargo, by an intention, real or pretended, to touch at intermediate neutral ports.
- (2) That contraband is always subject to seizure when being conveyed to a belligerent destination, whether the voyage be direct or indirect.
- (3) That ultimate destination alone justifies seizure of contraband.

<sup>1</sup> See p. 218, *supra*.

<sup>2</sup> 3 Wall. 514; *cf.* the *Springbok*, 5 Wall. 1; the *Peterhoff*, 5 Wall. 28.



Destination :  
Continuous  
Voyage.

It followed from this decision that neutral traders could be arrested on mere suspicion of intention to convey contraband to the enemy. It is clear that the English doctrine of continuous voyage lent no support to such a claim. Indeed, in the *Imina*<sup>1</sup> Lord Stowell, the author of that doctrine, had explicitly held that the rule concerning contraband was that the articles must be taken in the actual prosecution of the voyage to an enemy's port. The American view, which was acted upon in the case of the *Hart*<sup>2</sup> was made the subject of severe criticism, and Mr. Justice Nelson, himself a judge of the American Supreme Court at the time, admitted:—'The truth is, that the feeling of the country was deep and strong against England, and the judges, as individual citizens, were no exception to that feeling.'<sup>3</sup>

25. It is at the same time conceived that on principle the objection to the American doctrine rests in the extreme difficulty of proving to satisfaction an ultimate destination in cases where mediate calls in neutral ports are admittedly contemplated. This objection will not apply to cases where the intention to carry a cargo then on board to an enemy port is in fact established, or where it is clear that the cargo, though intended to be discharged at a neutral port, is to be conveyed thence by some other means of transport to an enemy destination. It is admitted that the evidence must be almost irresistibly strong, but assuming it to be so, it is not clear that the neutral has any ground of complaint. The case, in fact, falls within Lord Stowell's dictum in the *Imina*: 'A voyage is none the less a voyage to an enemy's port that it is broken by calls on the way.' It was on this principle that the British Government acted during the Boer War in 1899 and 1900 in the cases of the *Bundesrath*, the *Hersog* and the *General*, which were detained on the suspicion that they were carrying contraband and combatant persons who were destined for the Transvaal though, as that country had no seaboard, their primary destination was of necessity a neutral port. There was not sufficient evidence to justify the bringing of those vessels before a court, and they were released and compensation was paid by the British Government.<sup>4</sup> Germany insisted strongly that 'according to the recognised principles

<sup>1</sup> 3 C. Rob. 167 (1800).

<sup>3</sup> Hall, 6th ed. p. 669.

<sup>2</sup> 3 Wall. 559.

<sup>4</sup> *Ibid.*

of international law there cannot be contraband of war in trade between neutral ports': and the British Government quoted Bluntschli in reply:—*'Si les navires ou marchandises ne sont expédiés à destination d'un port neutre que pour mieux venir en aide à l'ennemi il y aura contrabande de guerre et la confiscation sera justifiée.'*

Destination :  
Continuous  
Voyage.

Italy<sup>1</sup> in her Abyssinian campaign held and acted upon the English view: and indeed it is difficult to see by what other means the legitimate rights of a belligerent could be enforced in cases where the only approach to his enemy's country by sea is through neutral ports. The right for which Lord Salisbury in 1900 contended ought, no doubt, to be exercised in practice with extreme considerateness and care, but it is certain to be claimed by every belligerent who sees that munitions of war are reaching his opponent through neutral channels.

26. At the Conference of London, Great Britain, the United States, Russia, France, Italy, and Japan were all in favour of this application of the doctrine of continuous voyage, but it was strongly objected to by Austria and by Germany, the latter country having fresh in its recollection its own recent protest during the South African War. In the course of the discussion, however, Germany modified her attitude,<sup>2</sup> and insisted only upon its abolition in the case of conditional contraband as a condition precedent to her acceptance of the list of free goods which we deal with later: and the ultimate decision reached was in the nature of a compromise on this basis.

In laying down the rule as to the destination of articles of absolute contraband, the doctrine of continuous voyage was expressly recognised in the following terms:—

*'Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails transshipment or a subsequent transport by land' (Article 30).*

We shall see later how it was agreed that the doctrine be

<sup>1</sup> In 1896. The *Doeljiwik*, see *Parl. Papers*, Misc., No. 5 (1909), Cd. 4555, p. 96.

<sup>2</sup> Cd. Misc., No. 5 (1909), 4555, p. 195.



Absolute Contra-  
band : Destina-  
tion.

abolished in the case of conditional contraband, except when the enemy has no seaboard.

27. Questions of evidence were dealt with in the following Articles:—

*Proof of the destination specified in Article 30 is complete in the following cases:—*

(1) *When the goods are documented for discharge in an enemy port, or for delivery to the armed forces of the enemy.*

(2) *When the vessel is to call at enemy ports only, or when she is to touch at an enemy port or meet the armed forces of the enemy before reaching the neutral port for which the goods in question are documented (Article 31).*

*'Where a vessel is carrying absolute contraband, her papers are conclusive proof as to the voyage on which she is engaged unless she is found clearly out of the course indicated by her papers and unable to give adequate reasons to justify such deviation' (Article 32).*

In Article 31 (2) only the words 'enemy port' are used, but they are intended to be read in the light of the words 'territory belonging to or occupied by the enemy' in Article 30: so that in an 'enemy port' is included 'a port occupied by the enemy.' Probably when the two Articles are read together the intention is sufficiently clear from the actual words used: but the official commentary which, as we have seen<sup>1</sup> must probably be regarded as binding, removes all doubt on the point.

The meaning of 'proof of the destination is complete' ('la destination . . . est définitivement prouvée') is that though the onus of proof is on the captor, yet once he has established the facts specified in Article 31 (1) or (2), no evidence in rebuttal will be admitted. The documents in (1) are a clear admission: (2) may cause more trouble in the case of vessels engaged in a voyage to and between many ports, but any other rule would probably make fraud too easy, or even if there were no fraud, would put it in the power of the enemy forcibly to requisition the goods.

Conditional Con-  
triband.

28. There being no prospect of any agreement to abolish

<sup>1</sup> P. 226, *supra*.

entirely the doctrine of conditional contraband, the Conference drew up a list of articles to be deemed to be included in that category. The general principle laid down by the majority of the powers at the Conference was that the belligerent had the right of drawing up and the duty of publishing such a list on the outbreak of war: and it was a marked advance in the direction of certainty and the avoidance of disputes that such a list should be settled beforehand.

A list proposed by the British Government was adopted with certain modifications in the following form:—

*The following Articles, susceptible of use in war as well as for purposes of peace, may without notice<sup>1</sup> be treated as contraband of war, under the name of conditional contraband:—*

- (1) Foodstuffs.
- (2) Forage and grain, suitable for feeding animals.
- (3) Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.
- (4) Gold and silver in coin or bullion; paper money.<sup>2</sup>
- (5) Vehicles of all kinds available for use in war, and their component parts.
- (6) Vessels, craft, and boats of all kinds: floating docks, parts of docks and their component parts.
- (7) Railway material, both fixed and rolling stock, and material for telegraphs, wireless telegraphs and telephones.
- (8) Balloons and flying machines and their distinctive component parts, together with accessories and articles recognisable as intended for use in connection with balloons and flying machines.
- (9) Fuel: lubricants.
- (10) Powder and explosives not specially prepared for use in war.
- (11) Barbed wire and implements for fixing and cutting the same.

<sup>1</sup> 'De plein droit.'

<sup>2</sup> This is declared in the Report not to include bills of exchange and cheques.



## INTERNATIONAL LAW

- (12) *Horseshoes and shoeing materials.*
- (13) *Harness and saddlery.*
- (14) *Field-glasses, telescopes, chronometers, and all kinds of nautical instruments (Article 24).*

29. A provision for extension of this list was inserted similar to that made in the case of absolute contraband:—

*'Articles susceptible of use in war as well as for purposes of peace, other than those enumerated in Articles 22 and 24, may be added to the list of conditional contraband by a declaration, which must be notified in the manner provided for in Article 23, paragraph 2' (Article 25).*

This gave expression to the view held with practical unanimity by the powers that in certain circumstances almost any article may acquire a contraband character if its destination is the armed forces of a belligerent: and that the most that could be done was to ensure that articles other than those specified should not be treated as contraband without notice. Further protection was given to neutral trade by Article 43:—

*'If a vessel is encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband which applies to her cargo, the contraband cannot be condemned except on payment of compensation; the vessel herself and the remainder of the cargo are not liable to condemnation or to the costs and expenses referred to in Article 41.<sup>1</sup> The same rule applies if the master, after becoming aware of the outbreak of hostilities, or of the declaration of contraband, has had no opportunity of discharging the contraband.*

*A vessel is deemed to be aware of the existence of a state of war, or of a declaration of contraband, if she left a neutral port subsequently to the notification to the power to which such port belongs of the outbreak of hostilities or of the declaration of contraband respectively, provided that such notification was made in sufficient time. A vessel is also deemed to be aware*

<sup>1</sup> *I.e.*, the costs and expenses incurred by the captor when, though contraband is carried, the vessel is released. See p. 254, *infra*.

*of the existence of a state of war if she left an enemy port after the outbreak of hostilities.'*

Neutrals unaware  
of Hostilities.

30. It was also thought desirable to provide for notice to neutrals, in case a belligerent should decide to treat any of the articles mentioned in the lists as free, or as conditional instead of absolute contraband :

*'If a power waives, so far as it is concerned, the right to treat as contraband of war an article comprised in any of the classes enumerated in Articles 22 and 24, such intention shall be announced by a declaration, which must be notified in the manner provided for in Article 23, paragraph 2' (Article 26).*

Nothing is said as to the effect of not giving such notification, but there would obviously be an inconvenient uncertainty if a belligerent, merely giving private instructions to his cruisers, were to treat certain articles as at one time contraband and at another free, or at one time absolute contraband and at another conditional. A claim may be made by neutrals that the treating of an article as free (or conditional, as the case may be) *ipso facto* debars the belligerent from subsequently subjecting that article to different treatment without notice : but the true view probably is that only the terms of the Declaration can be relied upon in the absence of any notice to the contrary, and that if any particular merchant has been more leniently dealt with than he might have been under the Declaration, his case cannot of itself be relied upon by others as a precedent. But it would obviously be convenient to neutral trade that any such uncertainty should be removed : and it might have been expected that some rule would be laid down analogous to the rule that a blockade must be impartially enforced against all the world.

31. The rule as to destination of conditional contraband is set out in the following Articles :—

Destination of  
Conditional Con-  
triband.

*'Conditional contraband is liable to capture if it is shown to be destined for the use of the armed forces or of a government department of the enemy state, unless in this latter case the circumstances show that the*



Destination of  
Conditional Con-  
traband.

*goods cannot in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4)<sup>1</sup> (Article 33).*

*'The destination referred to in Article 33 is presumed to exist if the goods are consigned to enemy authorities, or to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy. A similar presumption of this kind arises if the goods are consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption, however, arises in the case of a merchant vessel bound for one of these places, if it is sought to prove that she herself is contraband.*

*'In cases where the above presumptions do not arise, the destination is presumed to be innocent.*

*'The presumptions set up by this Article may be rebutted' (Article 34).*

These Articles embody the British rule that proof of destination for the forces of the enemy is essential,<sup>2</sup> with the exception that in place of the words 'place of military or naval equipment' or similar words (which were given by way of example) there are used the words 'base for the armed forces.' The distinction does not appear likely to make much if any difference in practice. Under the law (such as it is) as it stands there seems little doubt that a place regularly used for supplying, by railway transit, a place of equipment, would be treated in the same way as the actual place of equipment. The old cases decided when there were no railways afford no reliable guidance. No specific provision is made for the case of fraudulent concealment or spoliation of the ship's papers, which the British courts have held to raise the presumption of such destination: but there can be little doubt that fraud of this kind will always be considered to supply the proof required.

32. It is to be noted that in Article 34 the presumption of

<sup>1</sup> *I.e.* Gold and silver in coin or bullion: paper money.

<sup>2</sup> *Cf. Jonge Margaretha*, 1 C. Rob. 188 (1798); the *Edward*, 4 C. Rob. 68 (1801); the *Ringende Jacob*, 1 C. Rob. at p. 92 (1798); the *Twendre Brodre*, 4 C. Rob. 33 (1801).

such destination is said to arise when the goods are consigned 'to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy' ('a un commerçant établi en pays ennemi et lorsqu'il est notoire que ce commerçant fournit à l'ennemi des objets et matériaux de cette nature'). The wording of this passage is somewhat loose, and it has been suggested that the words 'l'ennemi' refer to any enemy subject: with the result that the presumption of destination to hostile forces or government departments would arise in the case of any goods consigned to a merchant who supplies goods of that kind to the public generally; that is, in effect, to any merchant whatsoever. This interpretation would, however, render practically meaningless the whole of the provisions as to the distinction between absolute and conditional contraband: it is in flat contradiction of the official commentary which accompanies the Declaration<sup>1</sup> and will, it seems, be held authoritative by the prize courts; and it may be added, a similar use of the words 'l'ennemi' was held to mean the enemy Government by the Russian courts in the *Chalchas* in 1904.<sup>2</sup>

Destination of  
Conditional Con-  
traband.

33. By Article 35 it was provided that:—

Abolition of  
'Continuous  
Voyage.'

*'Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.'*

*'The ship's papers are conclusive proof both as to the voyage on which the vessel is engaged and as to the port of discharge of the goods, unless she is found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.'*

By this Article the doctrine of continuous voyage is abolished in the case of conditional contraband, and subject to the proviso contained in the latter part of the Article, if

<sup>1</sup> The words of the Report of the Drafting Committee are 'un commerçant établi en pays ennemi, qui est le fournisseur notoire du Gouvernement ennemi pour les articles dont il s'agit.'

<sup>2</sup> Atherley Jones, *Commerce in War*, pp. 48, 87, 90; and see p. 233, *supra*.



Abolition of Continuous Voyage.

goods are found to be documented to a neutral port, no further conjecture or examination is possible as to any destination beyond that port.

34. The conclusiveness of the ship's papers is intended, however, to depend upon their *bona fides*; and will not be allowed to cover fraud. The Report of the Drafting Committee must again be referred to as evidence of intention:— 'This rule as to the proof furnished by the ship's papers is intended to prevent claims frivolously raised by a cruiser and giving rise to unjustifiable captures. It must not be too literally interpreted, for that would make all frauds easy. Thus it does not hold good when the vessel is encountered at sea clearly out of the course which she ought to have followed and unable to justify such deviation. The ship's papers are then in contradiction with the true facts and lose all value as evidence; the cruiser will be free to decide according to the merits of the case. In the same way a search of the vessel may reveal facts which irrefutably prove that her destination or the place where the goods are to be discharged is incorrectly entered in the ship's papers. The commander of the cruiser is then free to judge of the circumstances and capture the vessel or not, according to his judgment. To resume, the ship's papers are proof unless facts show their evidence to be false. This qualification of the value of the ship's papers as proof seems self-evident and unworthy of special mention. The aim has been not to appear to weaken the force of the general rule, which forms a safeguard for neutral trade.'

35. The contention put forward by Great Britain during the Boer War<sup>1</sup> was recognised to be sound, and the following exception was made to the rule abolishing the doctrine of continuous voyage:—

*'Notwithstanding the provisions of Article 35, conditional contraband, if shown to have the destination referred to in Article 33, is liable to capture in cases where the enemy country has no seaboard' (Article 36).*

Duration of Liability to Capture.

36. The liability to capture of a vessel carrying contraband begins when she leaves her port of departure and ends

<sup>1</sup> See p. 240, *supra*.

when she discharges the contraband cargo.<sup>1</sup> A passing doubt was thrown upon the unanimity with which this principle is accepted when in 1904<sup>2</sup> the Russian prize court at Vladivostok, in condemning the *Allanton*, relied upon the fact that the vessel had carried contraband on a previous voyage: but the true principle was laid down by the Supreme Court at St. Petersburg:—‘The delivery by the *Allanton* on her first voyage of a cargo of Cardiff coal to the Japanese port of Sasebo cannot serve as sufficient ground for the confiscation of the cargo subsequently shipped from Muroran to Singapore, as, in virtue of Article 11 of the Prize Regulations, vessels of neutral nationality are liable to confiscation only in the event of their being caught in the act of conveying contraband to the enemy or to an enemy’s port, and by no means if they had on a previous occasion carried contraband to the enemy.’

Duration of Liability to Capture.

The principle was enunciated in Articles 37 and 38:—

‘A vessel carrying goods liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole of her voyage, even if she is to touch at a port of call before reaching the hostile destination’ (Article 37).

‘A vessel may not be captured on the ground that she has carried contraband on a previous occasion if such carriage is in point of fact at an end’ (Article 38).

37. In some cases the English courts<sup>3</sup> have, in exceptional circumstances of fraud, held liable to condemnation vessels on the homeward voyage for having carried contraband on the outward voyage. No provision is made in the Declaration for such a contingency. The exception to the general rule is not unreasonable, and a vessel clearly proved guilty of such conduct can scarcely complain of hardship. But on the words of the Declaration no such exception would appear to be permissible. In the *Nancy* it was justified by the connection

<sup>1</sup> The *Imina*, 3 C. Rob. 168 (1800); the *Frederick Molke*, 1 C. Rob. 86, 87 (1798).

<sup>2</sup> Atherley Jones, *Commerce in War*, p. 83; and see p. 236, *supra*.

<sup>3</sup> The *Nancy*, 3 C. Rob. 122 (1800); the *Margaret*, 1 Acton 333; the *Trende Soestre*, 6 C. Rob. 390 (1806); Hall, 6th ed. p. 672.



Duration of Liability to Capture.

between the outward and the homeward cargo, the latter being the proceeds of the former, and by treating the whole voyage as one adventure tainted with fraud.

It was held in the case of the *Imina*<sup>1</sup> that if a destination originally hostile is changed in good faith and the ship is captured on its changed course, the offence is no longer committed: 'to say that it (the cargo) is nevertheless exposed to condemnation on account of the original destination as it stood in the minds of the owners, would be carrying the penalty of contraband further than it has ever been carried by this or the superior court.'

In like manner,<sup>2</sup> if the port of destination, originally hostile, ceases to be so by capture or surrender, the offence ceases and the goods are no longer contraband.

There is nothing in the Declaration of London to throw any doubt upon either of these principles.

Free Goods.

38. The main achievement of the Conference is to be found in the treatment of articles in the second class of the Grotian category, 'things which merely serve for pleasure and have no warlike use.'

The general principle is laid down in Article 27:—

*'Articles which are not susceptible of use in war may not be declared contraband of war.'*

By agreeing to the abandonment of the doctrine of continuous voyage in relation to conditional contraband, the British Government succeeded in securing the assent of the other nations to a list of specific articles which, without prejudice to the generality of Article 27, were to be regarded as in no circumstances contraband of war. These were set out in Article 28:—

*The following may not be declared contraband of war:—*

- (1) *Raw cotton, wool, silk, jute, flax, hemp and other raw materials of the textile industries, and yarns of the same.*
- (2) *Oil seeds and nuts: copra.*
- (3) *Rubber, resins, gums and lacs: hops.*
- (4) *Raw hides and horns; bones and ivory*

<sup>1</sup> 3 C. Rob. 167 (1800).

<sup>2</sup> The *Trende Sostre*, 6 C. Rob. 390n. (1807).

- (5) *Natural and artificial manures, including nitrates and phosphates for agricultural purposes.* Free Goods.
- (6) *Metallic ores.*
- (7) *Earths, clays, lime, chalk, stone, including marble, bricks, slates and tiles.*
- (8) *China ware and glass.*
- (9) *Paper and paper-making materials.*
- (10) *Soap, paint and colours, including articles exclusively used in their manufacture, and varnish.*
- (11) *Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.*
- (12) *Agricultural, mining, textile and printing machinery.*
- (13) *Precious and semi-precious stones, pearls, mother-of-pearl and coral.*
- (14) *Clocks and watches, other than chronometers.*
- (15) *Fashion and fancy goods.*
- (16) *Feathers of all kinds, hairs and bristles.*
- (17) *Articles of household furniture and decoration, office furniture and requisites.*

This list was further extended by Article 29 :—

*‘ Likewise the following may not be treated as contraband of war :—*

*(1) Articles serving exclusively to aid the sick and wounded. They can, however, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in Article 30.<sup>1</sup>*

*(2) Articles intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage.*

Hospital ships are specially dealt with under the Hague Convention of 1907<sup>2</sup> and the above Article does not apply to them : and the right of requisition only arises where the articles have an enemy destination.

<sup>1</sup> *I.e.* Territory belonging to or occupied by the enemy or the armed forces of the enemy. See p. 241, *supra*.

<sup>2</sup> Misc., No. 5 (1909), Cd. 4555, p. 356 ; and see p. 147, *supra*.



Penalty.

39. The ordinary penalty for carriage of contraband is confiscation of the cargo :—

*'Contraband goods are liable to condemnation' (Article 39).*

In the case of conditional contraband there has been in the past a practice of substituting pre-emption for confiscation, that is, purchase of the goods at the market value, with the addition of 10 per cent. for profit :<sup>1</sup> and in some cases the same privilege was extended to goods which were clearly contraband but were the products of the country exporting them.<sup>2</sup>

Applied to undoubted contraband this doctrine is a concession to the neutral : but serious trouble was raised by its application by Great Britain in 1795 to articles which were not contraband at all.<sup>3</sup>

40. In the Memoranda drawn up by the powers for the purposes of the Conference, Austria-Hungary, while admitting that in theory and practice absolute contraband was subject to confiscation,<sup>4</sup> argued in favour of the principle of indemnity in all cases, with an option of sequestration only, if the belligerent desired it : but apart from this, no nation put forward any claim to the treatment of any contraband goods as subject merely to pre-emption, except in the case already mentioned, of vessels encountered at sea while unaware of the outbreak of hostilities or of the declaration of contraband applying to their cargo (Article 43).<sup>5</sup>

It would seem, therefore, that in view of the comprehensive character of the words of Article 39, the doctrine of pre-emption is to be regarded as a thing of the past ; and indeed, with the clear enumeration of what is contraband and what is not, established by the Declaration, the greater part of the reason for the doctrine has disappeared.

Fate of the Vessel.

41. With regard to the treatment of the vessel itself, practice has varied very greatly. The ancient rule was that the vessel is subject to condemnation, and it was defended by Sir

<sup>1</sup> The *Haabet* (1799); 2 C. Rob. 174, 182. A case of a cargo of corn.

<sup>2</sup> The *Twee Juffrewen*, 4 C. Rob. 242, 243 (1802). Cf. the *Eliza Holtz*, Adm. July 3, 1784, referred to in the *Ringende Jacob*, 1 C. Rob. 91 (1798); the *Sarah Christina*, 1 C. Rob. 241 (1799).

<sup>3</sup> Lawrence, p. 622; Hall, 6th ed. pp. 663, 664.

<sup>4</sup> Cd. Misc., No. 5 (1909), 4555, p. 70.

<sup>5</sup> See p. 244, *supra*.

W. Scott in the *Neutralitet*<sup>1</sup>:—‘If to supply the enemy with such articles is a noxious act with respect to the owner of the cargo, the vehicle which is instrumental in effecting that illegal purpose cannot be innocent. The policy of modern times has, however, introduced a relaxation on this point; and the general rule now is that the vessel does not become confiscable for that act. But this rule is liable to exceptions. Where a ship belongs to the owner of the cargo, or where the ship is going on such service under a false destination or false papers, these circumstances of aggravation have been held to constitute excepted cases out of the modern rule, and to continue them under the ancient one.’

The modern rule appeared in treaties so early as 1650,<sup>2</sup> and 1655,<sup>3</sup> and was well established by the end of the eighteenth century; though Russia so late as 1854 claimed the right to confiscate neutral vessels carrying contraband<sup>4</sup> and even in 1904 issued a Declaration to the effect that ‘neutral ships captured while engaged in flagrant act of contraband can, according to circumstances, be seized and even confiscated.’ It was illustrated in the *Jonge Tobias*,<sup>5</sup> where the owner of the cargo being part owner of the vessel, his share in the vessel was condemned, while the other part owners were held to be not affected by his acts; and in the *Franklin*,<sup>6</sup> where the vessel was condemned on the ground of a false destination.<sup>7</sup>

Forcible resistance to the captor is also under the modern rule a ground for condemnation of the vessel.<sup>8</sup>

42. Another method of dealing with the question was to make the fate of the ship depend upon the quantity of contraband carried. By the French regulations of 1778, the ship was confiscated if three-quarters of its cargo were contraband;<sup>9</sup> and though the principle seems not to have been generally acted upon in practice to any appreciable extent, it was put

<sup>1</sup> 3 C. Rob. 295 (1801).

<sup>2</sup> Between Spain and the United Provinces. Atherley Jones, *Commerce in War*, p. 378.

<sup>3</sup> Between France and the Hanseatic Towns.

<sup>4</sup> Declaration of April 19, 1854, (see Atherley Jones at p. 379).

<sup>5</sup> 1 C. Rob. 329 (1799).

<sup>6</sup> 3 C. Rob. 217 (1801).

<sup>7</sup> Cf. also the *Edward*, 4 C. Rob. 68 (1801); the *Richmond*, 5 C. Rob. 325 (1804); the *Ranger*, 6 C. Rob. 125 (1805).

<sup>8</sup> Misc., No. 5 (1909), Cd. 4555, pp. 70, 71.

<sup>9</sup> Atherley Jones, *Commerce in War*, p. 378.



Fate of the Vessel. before the Conference as in theory reasonable by Germany, France, Japan (which named no definite proportion, but only suggested that the ship be forfeited when the transport of contraband is the principal object of the voyage), the Netherlands (which similarly required the contraband to be 'an important part' of the cargo), and Russia.

The Conference adopted the suggestion that some such proportion should be taken, and Article 40 represents a compromise on the question of the amount of such proportion :—

*'A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume or freight, forms more than half the cargo.'*

It was necessary to adopt all the four alternative standards in order to minimise the possibility of devices being employed to defeat the intention of the clause; but the real safeguard against any systematic carrying of just such a quantity of contraband as will enable the ship to avoid confiscation lies in Article 41 :—

*'If a vessel carrying contraband is released, she may<sup>1</sup> be condemned to pay the costs and expenses incurred by the captor in respect of the proceedings in the National Prize Court and the custody of the ship and cargo during the proceedings.'*

The expenses of the custody of the vessel are in the Report of the Drafting Committee expressly stated to include the keep of the captured vessel's crew.

By the British practice<sup>2</sup> a ship was refused her freight and expenses, unless as in the *Neptunus*<sup>3</sup> the amount of contraband carried was very small; and the American courts followed a similar rule.<sup>4</sup> The above Article apparently goes rather further by making the offending vessel liable for costs.

Treatment of Innocent Goods in the same Vessel.

43. The principle that innocent goods carried in the same vessel go free unless they belong to the owner of the contraband goods<sup>5</sup> is embodied in Article 42 :—

<sup>1</sup> This, it appears, should be must: the French version being '*les frais . . . sont à la charge du navire.*'

<sup>2</sup> The *Sarah Christina*, 1 C. Rob. 237 (1799); the *Mercurius*, 1 C. Rob. 288 (1799).

<sup>3</sup> 1 C. Rob. 108 (1800).

<sup>4</sup> The *Commercen*, 1 Wheat. 387.

<sup>5</sup> The *Stadt Embden*, 1 C. Rob. 26 (1798).

*'Goods which belong to the owner of the contraband, and are on board the same vessel, are liable to condemnation.'*

Treatment of  
Innocent Goods.

And by Article 44 it was provided that :—

*'A vessel which has been stopped on the ground that she is carrying contraband, and which is not liable to condemnation on account of the proportion of contraband on board, may, when the circumstances permit, be allowed to continue her voyage if the master is willing to hand over the contraband to the belligerent war ship. The delivery of the contraband must be entered by the captor on the log-book of the vessel stopped, and the master must give the captor duly certified copies of all relevant papers. The captor is at liberty to destroy the contraband that has been handed over to him under these conditions.'*

This provision is purely permissive. It was suggested that it should be made obligatory upon the captor to allow the vessel to proceed upon surrender of the goods, provided that such surrender were in the circumstances possible, and there were no well-founded suspicions that the vessel was carrying other contraband than that disclosed ; but there was no agreement that the imposition of such an obligation was desirable. It has been advocated by some writers and adopted in many treaties,<sup>1</sup> but it would probably prove unworkable in practice.

<sup>1</sup> See the list set out in Hall, 6th ed. p. 665n.



## CHAPTER V

### THE LAW OF BLOCKADE

1. THE question of the rules regulating a blockade was the first which engaged the attention of the delegates at the Conference of London. A series of twenty-one Articles was drawn up and agreed upon, partly as representing the generally recognised principles of international law and partly by way of conventional stipulation on points where no such generally recognised principle could be found.

With pacific blockade, which is dealt with elsewhere,<sup>1</sup> these rules had nothing to do; the intention being to treat of blockade solely as an operation of war.

Definition of  
Blockades.

2. A blockade may be generally described as the obstruction of commerce to or from a defined part of the enemy's coast by sea as an incident in hostile operations. It is practically always carried out by a war ship or war ships of a belligerent; though in certain circumstances it may be effected by land batteries commanding the approach to a blockaded port.<sup>2</sup> But it must in that case be supported 'by a naval force sufficient to warn off innocent, and capture offending vessels attempting to enter';<sup>3</sup> so that such exception to the rule that a blockade is an operation of warships is one of little substance, and indeed did not require to be dealt with specifically in the Declaration of London, which does not attempt to define the word 'blockade.' That the operation is carried on by ships is, however, the underlying assumption of the whole of the Articles on the subject, and the true view probably is that the operations of land batteries are supplementary to the operations of the ships, as is, for instance, the blocking up of a channel by stones, sunken ships, or other obstructions: a method of procedure against which Great

<sup>1</sup> See p. 108, *supra*.

<sup>2</sup> Halleck, *International Law*, vol. ii. p. 189.

<sup>3</sup> The *Circassian* (1864), 2 Wall., 135, 149.

Britain, with no very good grounds, protested, when it was applied to the approaches to Charleston and Savannah by the Federal forces in 1861.<sup>1</sup>

3. The limitations of a blockade are defined in the Declaration as follows:—

Limitations of  
Blockade.

*'A blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy (Article 1).*

*'The blockading forces must not bar access to neutral ports or coasts' (Article 18).*

These rules follow as of course from the fact that a belligerent can only direct a blockade against his enemy, and in most cases they may seem to be a mere truism. But a port may be blockaded by the stationing of a ship or ships at the mouth of a river, or of a narrow passage, many miles away; one ship, for instance, blockaded Riga in 1854, by lying at the entrance of a channel 120 miles distant<sup>2</sup>; and Buenos Ayres was blockaded from the neighbourhood of Montevideo.<sup>3</sup> When, therefore, such a river or channel leads to a neutral as well as to an enemy port, or forms the boundary line between neutral and enemy territory, the above rules become of great practical importance, and they enunciate the principle laid down by Lord Stowell in 1799,<sup>4</sup> when a notified blockade of Holland was held not to be violated by a destination to Antwerp, and the Scheldt was treated as a conterminous river, not within Dutch territory. This case was followed by the United States courts during the American Civil War,<sup>5</sup> when the Texan shore of the Rio Grande being blockaded, trade with Matamoras on the Mexican shore was held to be lawful, subject to the duty of the neutral not to place his ship in suspicious propinquity to the blockaded shore.

4. It was laid down by the Declaration of Paris that blockades to be valid must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy. Paper blockades, or such as are not

Blockade  
must be  
Effective.

<sup>1</sup> Lawrence, *Principles of International Law*, p. 583.

<sup>2</sup> The *Franciska*, Spinks, 115.

<sup>3</sup> Hall, 6th ed. p. 702.

<sup>4</sup> *Frau Isabe*, 4 C. Rob. 63 (1799); Hall, 6th ed. p. 713.

<sup>5</sup> The *Peterhoff* (1866) 5 Wall. 28, 52; *Dashing Wave*, *Ibid.*, 170; *Volant*, *Ibid.*, 178; *Science*, *Ibid.*, 179; Hall, 6th ed. p. 714.



Blockade must be  
Effective.

supported by the material strength to make them effective on the spot, have been by universal agreement for a long time inadmissible. The Napoleonic wars pushed this form of blockade to its illogical conclusion. The French Decree of Berlin in 1806 is well known :—

Art. 1. 'Les Iles Britanniques sont déclarées en état de blocus.'

Art. 2. 'Tout commerce et toute correspondance avec elles est défendu.'

The decree was followed by retaliatory orders issuing from Great Britain, the legality of which was vindicated by Lord Stowell in the *Snipe* :<sup>1</sup>

'These orders were intended and professed to be retaliatory against France ; without reference to that character they have not, and would not have, been defended ; but in that character they have been justly, in my apprehension, deemed reconcilable with those rules of natural justice by which the international communications of independent states are usually governed.'

That the action of Great Britain was justified even on the ground of retaliation has been questioned by such high authorities as Sir R. Phillimore,<sup>2</sup> and Sir William Harcourt,<sup>3</sup> and indeed it is not easy to justify retaliation upon neutrals for the sins of your enemy ; while apart from such justification it would be difficult to treat the whole incident, even from the standpoint of the age at which it happened, as anything but an ebullition of reckless illegality. The principle of the necessity of effectiveness was recognised by the Armed Neutralities of 1780 and 1800 ; it was acted upon in such cases as the *Arthur*,<sup>4</sup> the *Nancy*,<sup>5</sup> and the *Franciska*<sup>6</sup> (1855) ; it was confirmed in numerous treaties, notably in those between Great Britain and the United States in 1794, between Great Britain and Russia in 1801,<sup>7</sup> between France and Denmark in 1742, and between Russia and Denmark in 1818<sup>8</sup> : its validity was recognised, though its application was

<sup>1</sup> Edwards, pp. 381, 382.

<sup>2</sup> *International Law*, vol. iii. s. 321.

<sup>3</sup> Letters, *International Law*, p. 94. <sup>4</sup> 1 Dodson, 425.

<sup>5</sup> Acton's Reports, p. 58.

<sup>6</sup> 10 Moore, P.C.C. 37.

<sup>7</sup> Wheaton, p. 673.

<sup>8</sup> Woolsey, *International Law*, 5th ed. p. 353.

rather strained when in 1861 the United States blockaded a Confederate coast-line of over 3000 miles; and it was the basis of the successful British protests against the French blockade of Formosa in 1884<sup>1</sup> and against the blockade of the insurgent Haytian ports in 1888. The principle was thus well established long before its enunciation in the Declaration of Paris in 1856: and in the Declaration of London it was only found necessary to repeat the words used in the earlier Declaration as follows:—

*'In accordance with the Declaration of Paris of 1856, a blockade, in order to be binding, must be effective, that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coast-line' (Article 2).*

Attempts have been made from time to time to produce what would be in effect a paper blockade by Governments struggling against insurgents in their own territory. New Granada in such circumstances attempted to close certain ports by an order in 1861,<sup>2</sup> and in 1862 the United States proposed to adopt the same measure in regard to the ports in the southern states. British protests were in both cases successful, and in 1885 the United States itself insisted on the illegality of such an attempt when it was made by the President of Colombia.

5. It is agreed then that blockades must be effective, but there is no agreement to define 'effectiveness'; a fact which is recognised by Article 3 of the Declaration of London:—

*'The question whether a blockade is effective is a question of fact.'*

Each case can only be decided on its own circumstances, first by the national tribunal and then by the International Court of Appeal. In England<sup>3</sup> and in America<sup>4</sup> the principle applied in the past has been that a blockade is sufficiently effective provided that, under normal conditions, a

<sup>1</sup> Ann. Register, 1884, p. 374.

<sup>2</sup> Hall, 6th ed. p. 34n., Lawrence, *Principles of International Law*, p. 584.

<sup>3</sup> *The Columbia*, 1 C. Rob. 156 (1799); *the Hoffnung*, 6 C. Rob. 116 (1805); *the Frederick Molke*, 1 C. Rob. 86 (1798).

<sup>4</sup> *Radcliff's case*, T. Johnson's *American Cases*, p. 53.

Blockade must be Effective.

Criterion of 'Effectiveness.'

British and American View.



Criterion of  
Effectiveness.

breach of it would be unlikely to succeed, or at least very difficult. A place must be 'watched by a force sufficient to render the egress or ingress dangerous: or in other words, save under peculiar circumstances, as fogs, violent winds, and some necessary absences, sufficient to render the capture of vessels attempting to go in or come out most probable.'<sup>1</sup> That the blockading squadron is small, or is a long way off, is not in the least conclusive against the validity of the blockade. Not nearness but capability to maintain the blockade is the true criterion.<sup>2</sup> Riga, as has already been mentioned,<sup>3</sup> was effectively blockaded by one ship at a distance of 120 miles: and the development of mines and torpedoes, and the increased range of modern artillery, made and will make it necessary for blockading squadrons to place a considerable space between themselves and the blockaded port or coast. The Japanese in 1904 blockaded Port Arthur without approaching within many miles of the place: thereby adopting, apparently, the tactics of Lord Nelson, who always insisted that the blockading squadron ought not to be seen from the blockaded port.<sup>4</sup>

6. In the *Arthur*<sup>5</sup> Lord Stowell observed that the usual and regular mode of enforcing a blockade is 'by stationing a number of ships and forming as it were an arch of circumvallation round the prohibited part. If the arch fails in any one part, the blockade itself fails altogether': but these words were applied to the circumstances of naval war in 1814, and in modern naval operations stress can hardly be laid on the necessity for anything like an arch of circumvallation. Nor have the prize courts of Great Britain and the United States insisted that the effectiveness of blockades shall be absolutely constant. An accidental interruption occasioned by violent weather or fog has been treated as consistent with the continuance of a blockade:<sup>6</sup> nor is the blockade interrupted by the occasional success of a vessel in getting in or out,<sup>7</sup> or even by frequent successes of the kind,

<sup>1</sup> The *Franciska*, Spinks, 115.

<sup>2</sup> *Ibid.*, at p. 118: *Naylor v. Taylor*, 1 Moody and Malkin, p. 207.

<sup>3</sup> See p. 257.

<sup>4</sup> Clarke and M'Arthur's *Life of Nelson*, vol. ii. p. 363; Ann. Register, 1805, 233. <sup>5</sup> (1814) 1 Dods. 483.

<sup>6</sup> The *Franciska*, Spinks, 115.

<sup>7</sup> *Frederick Molke*, 1 C. Rob. 86 (1798); *Columbia*, 1 C. Rob. 154 (1799); the *Franciska*, Spinks, at p. 124.

if they are due, as in the case of the blockade of Charleston during the American Civil War, to special circumstances, such as the peculiar nature of the coast.<sup>1</sup> Criterion of Effectiveness.

7. While the validity of a blockade is impaired by allowing a great number of neutral vessels to pass through in the first instance, it is not impaired by the action of a commander who, having made a number of captures, selects a certain number of flagrant cases and dismisses the rest on the ground of particular circumstances, such as that he cannot afford prize crews to man his captures.<sup>2</sup>

In the *Hoffnung*<sup>3</sup> Lord Stowell distinguished the case where a blockading squadron was driven off by a superior force:—

‘When a squadron is driven off by accidents of weather, which must have entered into the contemplation of the belligerent imposing the blockade, there is no reason to suppose that such a circumstance would create a change of system, since it could not be expected that any blockade would continue many months without being liable to such temporary interruptions. But when a squadron is driven off by a superior force, a new course of events arises. . . . In such a case the neutral merchant is not bound to foresee or to conjecture that the blockade will be resumed.’

and it may be added that it was the obvious object of the superior force to procure the raising of the blockade, an object which it has, *ex hypothesi*, succeeded in attaining.

8. Continental nations and jurists have, on the other hand, attempted from time to time to specify with more detail the conditions of ‘effectiveness,’ and to confine within narrower bounds the belligerent’s right. Their standard was fairly expressed by Ortolan,<sup>4</sup> who refuses to recognise a blockade of a port unless ‘toutes les passes ou avenues qui y conduisent sont tellement gardées par des forces navales permanentes que tout bâtiment qui chercherait à s’y introduire ne puisse le faire sans être aperçu et sans en être détourné.’ Continental View.

In 1742 France and Denmark by treaty agreed that at least two vessels were essential, or a battery so placed on

<sup>1</sup> Hall, 6th ed. p. 703.

<sup>2</sup> The *Rolla*, 6 C. Rob. 364, 374 (1807).

<sup>3</sup> 6 C. Rob. at p. 117 (1805). See also the *Frederick Molke*, 1 C. Rob. 87 (1798); the *Columbia*, 1 C. Rob. 156 (1799).

<sup>4</sup> ii. 328.



Criterion of  
Effectiveness.

the coast that vessels could not get in without manifest danger:<sup>1</sup> Holland and the Sicilies in 1753 stipulated for at least six vessels, at a distance of little more than cannon shot from the blockaded port, or batteries so placed on the coast that entrance could not be effected without passing under the guns. The Armed Neutralities of 1780 and 1800 required the blockading ships to be stationary as well as adequate in force and sufficiently near, while a treaty between England and Russia in 1801 provided for the alternatives 'stationary or sufficiently near.'<sup>2</sup> Heffter, Calvo, Hautefeuille and Gessner all insisted on the requirement of stationary vessels guarding the immediate entrance to the port: Hautefeuille added that ships running in must be exposed to a cross fire: and he and Ortolan both contended that any accidental interruption put an end to the blockade. The French Naval Instructions of 1870 laid it down (when France was herself blockading) that 'a blockade is raised by any interruption whatever.'

The Declaration  
of London.

9. The Declaration of Paris, by declining to define what is a 'sufficient force,' left the matter vague, and the Declaration of London carries the question no further. The requirement, however, that the blockading vessels be stationary may be regarded as now obsolete; and in the Memoranda which were drawn up by the various powers represented at the Conference of London, and presented to the Conference as setting out the views of the powers on the law, no power used the word 'arrêtés,' which was used by the Armed Neutralities. It is true that the Memorandum presented by the Netherlands defined effectiveness as 'maintenu par des forces suffisantes et stationnées de manier a pouvoir empêcher l'entrée dans et la sortie du rayon bloqué,' and in the Russian Memorandum occur the words: 'stationnées de manier à créer un danger réel.' But it hardly follows that 'stationariness' in the sense referred to by the Armed Neutralities and the continental jurists above mentioned is implied in the word 'stationnées.' The French Memorandum was silent on the point: and Austria-Hungary and Spain contented themselves with a general approval of the Italian statement that 'le blocus est effectif lorsqu'il est maintenu par des forces bloquantes, disposées de façon à pouvoir surveiller les accès

<sup>1</sup> Woolsey *International Law*, 5th ed. p. 353.<sup>2</sup> Hall, 6th ed. p. 705.

du port et du littoral bloqué et apercevoir tout navire qui voudrait y aborder et étant en condition de pouvoir, le cas échéant, en empêcher effectivement l'entrée.' In a long explanation of the words 'area of operations' adopted by the Conference in the official Report, the requirement of stationariness was definitely abandoned, at any rate in the case of the blockade of a defended coast.<sup>1</sup>

Criterion of  
Effectiveness.

10. On the question whether a blockade is raised by temporary absence, the extreme view of the continental jurists and of France in 1870 was abandoned for something more nearly approaching the British view :—

Temporary  
Absence.

*'A blockade is not regarded as raised if the blockading force is temporarily withdrawn on account of stress of weather' (Article 4).*

This, however is, according to the Report of the Drafting Committee of the Conference, to be 'considered as limitative in the sense that stress of weather is the only form of compulsion which can be alleged': in other words, the doctrine 'expressio unius est exclusio alterius' is to apply, though it cannot be said to apply to other passages in the Declaration, which is by no means a complete code. In the passage quoted from the *Franciska* on page 260 above, an exception was made in the case of 'fogs, violent winds and some necessary absences,' and it has been suggested that a temporary withdrawal to chase a prize may be also an exception<sup>2</sup>: and the United States Code of Naval War (1900) excepts the case of a voluntary abandonment by the blockading force of its station carried out 'in the interest of the blockade.' One of the most important of such 'necessary absences' or absences 'in the interest of the blockade,' may be absence in pursuit of a prize, and it may probably be assumed that the International Court will, in view of Article 4, strictly construe any temporary absence, save such as is due to stress of weather, as invalidating the blockade and necessitating a fresh notification. Nor indeed does it seem unreasonable to insist that the blockading force must be large enough to enable it to pursue blockade-runners without leaving the blockaded port or coast open. Absences of the whole or the greater part of the force for reasons other

<sup>1</sup> See p. 276, *infra*.

<sup>2</sup> Hall, 6th ed. p. 703.



Temporary  
Absence.

than stress of weather will only occur when that force is very small : and blockades by one or two vessels, though possible, are likely to be rare. Nor is a strict interpretation of Article 4 likely to make much difference in the actual practice followed. Even the United States during the blockade of Galveston in 1863 realised the necessity of maintaining the blockade, and sent only an inferior vessel in pursuit of the *Alabama*, although only two years before she had refused to admit that the blockade of Charleston was at an end when, owing to the pursuit of a prize, the harbour had been open for five days.

With regard to temporary absence in the course of an engagement with an attacking force, there will probably be little difficulty. Such an absence is likely to be short, and if the blockading squadron is victorious, it can hardly be contended that an absence so essential to the maintenance of the blockade, and caused by a desire to maintain it, constitutes an abandonment.

Blockade must be  
Impartial.

11. A belligerent does not, as has been shown, lose his rights if some vessels, despite his vigilance, succeed in getting through : but he cannot concede to another belligerent, or to certain neutrals, or take for himself the right to carry on commercial intercourse which he forbids to other neutrals.<sup>1</sup> This principle is recognised in the Declaration :—

*'A blockade must be applied impartially to the ships of all nations' (Article 5).*

To the strictness of the rule that all vessels must be admitted or none, there are two exceptions.

The first is permissive :—

*'The commander of a blockading force may give permission to a war ship to enter and subsequently to leave a blockaded port' (Article 6).*

A blockade is an act of war, affecting not only neutral subjects but neutral states,<sup>2</sup> and the admission of a neutral war ship is an act of grace, and the object of laying down a rule upon the subject was merely to make it clear that the admission of neutral war ships has no effect in invalidating a blockade.

<sup>1</sup> The *Franciska*, 10 Moore P.C.C. at p. 48; the *Success*, 1 Dods. 134.

<sup>2</sup> Hall, 6th ed. p. 701.

The second exception was introduced on a suggestion made by Germany, Italy, Japan and Russia on the ground of humanity :—

*'In circumstances of distress, acknowledged by an officer of the blockading force, a neutral vessel may enter a place under blockade and subsequently leave it, provided that she has neither discharged nor shipped any cargo there' (Article 7).*

12. Distress being established and acknowledged, the vessel may enter as of right, unless the necessary assistance is provided by the blockading squadron<sup>1</sup> it being the intention of the Conference to make it clear that entry into the blockaded port is not to be subject to the authorisation of the officer, but merely to his acknowledgment of a state of distress.<sup>2</sup> That on proof of distress a vessel may enter is in accordance with a principle recognised by both American and English courts. In the case of the *Nuestra Señora de Regla*,<sup>3</sup> a Spanish vessel in distress, on her way from New York to Havannah, put into Port Royal, S.C. (then in rebellion and blockaded by a fleet of the United States) by leave of the admiral commanding the squadron, and was there seized and made use of by the Government of the United States. She was afterwards condemned as a prize; but the Supreme Court of the United States decided that she was not a lawful prize or subject to capture, and that her owners were entitled to a fair indemnity. In the case of the *Charlotta*,<sup>4</sup> the excuse of alleged distress was admitted after the delivery of an opinion of the Trinity Masters that the state of the wind and other circumstances made it impossible for the vessel to proceed to any other port than the blockaded one—the Texel. Lord Stowell used only to admit the want of water and provisions as an excuse for entering a blockaded port by a neutral where 'great necessity' or 'the clearest necessity' could be satisfactorily explained to exist. The proof must be clear: in the *Hurtige Hane*,<sup>5</sup> a Danish vessel alleged the want of water and provisions as an excuse for going into

<sup>1</sup> Comment of Drafting Committee; also Cd. 4555, p. 175.

<sup>2</sup> Cd. 4555, p. 175.

<sup>3</sup> 17 Wall. 29.

<sup>4</sup> 1 Edw. 252, 1810.

<sup>5</sup> 2 C. Rob. 124 (1799); cf. the *Panaghia Rhomba*, 12 Moore, P.C.C., 168 (1858).



Distress.

Amsterdam, a blockaded port, and Lord Stowell refused to admit the excuse, observing that :—

‘It is usual to set up the want of water and provisions as an excuse, and if I were to admit pretences of this sort, a blockade would be nothing more than an idle ceremony.’

13. By Article 7 of the Declaration, the decision of the question, which is essentially one of fact, is left to the officer commanding the blockading force: and it is obvious that many difficulties of fact will arise on which he will have to come to a conclusion on scanty materials. Presumably he is entitled to look not only at the actuality but also at the *bona fides* of the distress: whether the distress was *bona fide* will depend in many instances on the quantity of stores with which the vessel started, her seaworthiness on starting, the length of her voyage, her destination, and the nature of her cargo, and to attempt to lay down any rules on the point would have been futile: while questions of a different nature are suggested by the proviso against the discharge or shipping of cargo. It will be noticed that the words of the proviso are in the past tense (‘a la condition de n’y avoir laissé ni pris aucun chargement’) and can therefore only be applicable to the egress of the vessel after she has been allowed to go in. When this is taken in conjunction with the explanation contained in the Report of the Drafting Committee, ‘as soon as her distress is acknowledged by an authority of the blockading force, she *may* cross the line of blockade: it is not a favour which she has to ask of the humanity or courtesy of the blockading authority,’ it seems that the blockading squadron, if distress is proved, cannot impose upon the neutral any express condition as to the discharging or shipping of cargo, or insist upon any security that such a condition, express or implied, will be observed. The belligerent has merely the right to catch the ship, if he can, when and if it comes out, and confiscate it if any cargo is found to have been shipped or discharged. Apparently, therefore, the shipping or discharging of cargo after admission on the ground of distress is not to be regarded as a breach of faith, and it might in some cases, if the cargo were exceptionally valuable when sold in the blockaded port, be worth the neutrals’ while to allow the

vessel to remain there till the raising of the blockade, and Distress. so escape all punishment. It is true that an undertaking of the kind suggested would in many cases be futile: as however willing the neutral master were to abide by it, he would be at the mercy of superior force if his cargo were of value to the blockaded port. But there seems some ground for suggesting that it would not have been unfair to subject the vessel and cargo in such circumstances to some penalty greater than that applicable to an ordinary attempt to break blockade outwards: to make her, for instance, liable to capture and confiscation till the end of her homeward voyage, or even after the raising of the blockade, in spite of the restriction upon the right of capture contained in Article 20, which is dealt with hereafter. But the whole question is one of little importance, and can only occasionally arise.

14. It would clearly be unfair to neutrals that they should Declaration be subjected to the penalties of blockade-running until they are affected by sufficient notice of the existence of a blockade. As to the character of the notification necessary, there has existed in the past considerable divergence between the theory and practice of Great Britain, the United States, Germany and Denmark<sup>1</sup> on the one hand, and France, Italy, Spain and Sweden on the other.

A distinction must be made in the first place between 'declaration' and 'notification.' In the words of the Report of the Drafting Committee: 'The Declaration of blockade is the act of the competent authority (a Government or commander of a squadron), stating that a blockade is, or is about to be established under conditions to be specified. The notification is the fact of bringing the declaration of blockade to the knowledge of the neutral powers or of certain authorities': or, it should be added, of the individual neutral vessel in certain circumstances, as will be seen later.

This distinction is clearly drawn in Article 8 of the Declaration of London:—

*'A blockade, in order to be binding, must be declared in accordance with Article 9, and notified in accordance with Articles 11 and 16.'*

<sup>1</sup> Hall, 6th ed. p. 696.



## Declaration.

15. As to the necessity for a declaration, and as to its requirements, there can hardly be dispute. A blockade is an act of sovereignty<sup>1</sup> and can only be imposed by a Government or a naval officer with the authority of his Government: but such authority will be presumed, if the circumstances are such that express instructions are impossible. In other words, a blockade is an act of sovereignty which may be delegated.<sup>2</sup> But approval and adoption by the Government is necessary: such adoption relating back to the date of the imposition of the blockade.<sup>3</sup> The courts have been strict, too, in insisting that a blockade must not be extended either by construction or on the mere authority of the blockading commander.<sup>4</sup> And the declaration must be strictly in accordance with the facts; otherwise the blockade is invalid and a new declaration is necessary.<sup>5</sup>

Further, by a long-established custom, neutral vessels in the blockaded port are allowed a certain time, which must depend upon the circumstances, but is usually fifteen days, in which to leave:<sup>6</sup> but if they leave with cargo, such cargo must have been shipped before the commencement of the blockade. The United States apparently did not insist upon this limitation, as their Naval Code<sup>7</sup> required a statement, in the notification of blockade, of the time allowed to neutral vessels to unload, re-load and leave the port.

16. These principles are embodied in the following Articles:—

*'A declaration of blockade is made either by the blockading power or by the naval authorities acting in its name. It specifies—*

- (1) *The date when the blockade begins.*
- (2) *The geographical limits of the coast-line under blockade.*
- (3) *The period within which neutral vessels may come out (Article 9).*

<sup>1</sup> *Henrik and Maria* (1799), 1 C. Rob. pp. 146, 148.

<sup>2</sup> *The Rolla* (1807), 6 C. Rob. pp. 364, 366.

<sup>3</sup> *The Rolla* (*supra*); the *Franciska*, Spinks, at p. 114.

<sup>4</sup> *The Juffrow Maria*, 3 C. Rob. p. 147 (1800); the *Henrik and Maria*, *supra*.

<sup>5</sup> The *Henrik and Maria*, *supra*; the *Franciska*, Spinks, at p. 299.

<sup>6</sup> Hall, 6th ed. p. 708; Woolsey, p. 352*n*.

<sup>7</sup> Misc., No. 5 (1909), Cd. 4555, p. 84.

*'If the operations of the blockading power or of the naval authorities acting in its name, do not tally with the particulars which, in accordance with Article 9 (1) and (2), must be inserted in the declaration of blockade, the declaration is void, and a new declaration is necessary, in order to make the blockade operative' (Article 10).*

For the case, not provided for in Article 10, of neglect of Article 9 (3), provision is made in Article 16, as will be seen later. The blockade is not avoided, but the vessel coming out must be allowed to pass.

17. The question of notification has in the past presented more difficulties. What we may call the British view has always been that the notification or communication of the declaration of a blockade to neutral Governments constructively affects their subjects: and the latter are therefore not entitled to sail for the blockaded port on the chance that the blockade may have been suspended in the interval between their departure and their arrival. Further, knowledge, from whatsoever source derived, is sufficient to render the neutral liable, and in theory condemnation may be justified by the simple fact of notoriety, subject to this qualification that 'the notice to be inferred from general notoriety must be of such a character that if conveyed by distinct intimation from a competent authority it would have been binding.'<sup>1</sup>

The British view was stated by Lord Stowell in the *Columbia*:—<sup>2</sup>

'But it has been said that by the American Treaty there must be a previous warning: certainly where vessels sail without a knowledge of the blockade, a notice is necessary: but if you can affect them with the knowledge of that fact, a warning then becomes an idle ceremony, of no use, and therefore not to be required. The master, the consignees, and all persons intrusted with the management of the vessel, appear to have been sufficiently informed of the blockade, and therefore they are not in the situation which the treaty supposes. It is said also that the vessel had not arrived, that the offence was not actually committed, but rested in intention only. On this point I am clearly of opinion that the sailing with an intention of evading the blockade . . . was a beginning to execute that intention, and is to be taken as an overt act constitut-

<sup>1</sup> The *Franciska*, 10 Moore, P.C.C., p. 58.

<sup>2</sup> 1 C. Rob., at p. 156 (1799).



Notification :  
British View.

ing the offence. From that moment the blockade is fraudulently evaded.'

In the *Neptunus*<sup>1</sup> Lord Stowell laid it down that in no circumstances could a neutral individual be heard to plead ignorance of a blockade previously notified to his Government. He pointed out that 'it would be the most nugatory thing in the world if individuals were allowed to plead their ignorance of it: it is the duty of foreign Governments to communicate the information to their subjects, whose interests they are bound to protect.' 'I shall hold therefore,' he continued, 'that a neutral master can never be heard to aver against a notification of blockade that he is ignorant of it. If he is really ignorant of it, it may be a subject of representation to his own Government, and it may raise a claim of compensation from them, but it can be no plea in the court of a belligerent.'

American View.

18. The American view was stated in the judgment which Chase, C.J., delivered on behalf of the court in the *Circassian*.<sup>2</sup>

'It is a well-established principle of prize law, as administered by the courts both of the United States and Great Britain, that sailing from a neutral port with intent to enter a blockaded port, and with knowledge of the existence of the blockade, subjects the vessel and, in most cases, its cargo, to capture and condemnation. We are entirely satisfied with this rule. It was established with some hesitation when sailing vessels were the only vehicles of ocean commerce; but now, when steam and electricity have made all nations neighbours, and blockade-running from neutral ports seems to have been organised as a business, and almost raised to a profession, it is clearly seen to be indispensable to the efficient exercise of belligerent rights.'

There has been some doubt as to the United States doctrine<sup>3</sup> and several treaties,<sup>4</sup> to which that country was a party, and even one so late as 1871 (with Italy), provide for notification to a vessel on her voyage; yet the above principle was followed by the United States courts during the Civil War:<sup>5</sup> and Prussian and Danish practice is in accordance with that of Great Britain and the States.

<sup>1</sup> 2 C. Rob., pp. 111, 112 (1799).

<sup>2</sup> 2 Wall. at pp. 151, 152.

<sup>3</sup> Atherley Jones, *Commerce in War*, p. 105.

<sup>4</sup> Lawrence, *International Law*, p. 586. <sup>5</sup> Eg. The *Peterhoff*, 5 Wall. 28.

19. Two mitigations of the British and American practice may be mentioned. In the first place, vessels entering a place under blockade *de facto* only, or clearing from a home port before the public notification, are entitled to a particular warning or 'notification spéciale':<sup>1</sup> in the second place, where the port of clearance is very remote, 'lying at such a distance where they cannot have constant information of the state of the blockade, whether it continues or is relaxed, it is not unnatural that they should send their ship conjecturally, upon the expectation of finding the blockade broken.'<sup>2</sup> But as Lord Stowell added, and for obvious reasons, 'this inquiry should be made, not in the very mouth of the river or estuary from the blockading vessels, but in the ports that lie in the way, and which can furnish information without furnishing opportunities for fraud.'

20. The practice of France, Italy and Spain has in the past been more indulgent to neutrals. According to it, the essential notification in every case was the 'notification spéciale,' given on the spot to the neutral trader by a vessel of the blockading squadron.<sup>3</sup> It had, it is true, become customary for France to notify blockades to neutral Governments, but such notification was not held to affect the individual subjects of those Governments, or to enable the belligerent to seize a vessel which had not been first notified on the spot. The distinction to be found in the British practice between *de facto* blockade, which required special notification,<sup>4</sup> and a diplomatically notified blockade, which did not, was thus in the French practice non-existent.

In the French Memorandum<sup>5</sup> laid before the Conference at London, it was still claimed that a ship sailing towards a blockaded port is not to be regarded as affected with knowledge, unless the notification has been entered in her papers by a vessel belonging to the blockading squadron (and a similar position was taken up by Italy<sup>6</sup>): but this attitude was abandoned by France<sup>7</sup> after a study of the Memoranda of the various powers, on the ground that it was not a practice

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<sup>1</sup> The *Vrouw Judith*, 1 C. Rob. 150 at p. 152 (1799).

<sup>2</sup> The *Betsey*, 1 C. Rob. at p. 334 (1799).

<sup>3</sup> Hall, 6th ed., p. 697; Woolsey, *International Law*, 5th ed. p. 355.

<sup>4</sup> The *Mercurius*, 1 C. Rob. pp. 80, 83 (1798), and see *supra*.

<sup>5</sup> Misc., No. 5 (1909), Cd. 4555, p. 88. <sup>6</sup> *Ibid.* p. 89. <sup>7</sup> *Ibid.*, p. 161.



Notification:  
Continental View.

generally followed; that the reasons which justified it had gradually disappeared with the development of means of communication; and that the precautions taken to insure that a blockade shall be effective, and that its limits should be known, made the old French rule no longer necessary.

The Declaration  
of London.

21. The way was thus cleared for the adoption of Articles on which there was a general agreement. By Article 8, it had been provided that in order to be binding, a blockade must be notified in accordance with Articles 11 and 16. It was provided that:—

*'A declaration of blockade is notified—*

*'(1) To neutral powers by the blockading power, by means of a communication addressed to the Governments direct or to their representatives accredited to it:*

*'(2) To the local authorities by the officer commanding the blockading force. The local authorities will, in turn, inform the foreign consular officers at the port, or on the coast-line under blockade, as soon as possible' (Article 11).*

*'The rules as to declaration and notification of blockade apply to cases where the limits of a blockade are extended, or where a blockade is re-established after having been raised' (Article 12).*

*'The voluntary raising of a blockade, as also any restriction in the limits of a blockade, must be notified in the manner prescribed by Article 11' (Article 13).*

*The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade' (Article 14).*

*'Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade to the power to which such port belongs, provided that such notification was made in sufficient time' (Article 15).*

*'If a vessel approaching a blockaded port has no knowledge, actual or presumptive, of the blockade, the notification must be made to the vessel itself by an officer of one*

*of the ships of the blockading force. This notification* Notification.  
*should be entered in the vessel's logbook, and must*  
*state the day and hour and the geographical position*  
*of the vessel at the time. If, through the negligence*  
*of the officer commanding the blockading force, no*  
*declaration of blockade has been notified to the local*  
*authorities, or if, in the declaration, as notified, no*  
*period has been mentioned within which neutral vessels*  
*may come out, a neutral vessel coming out of the block-*  
*aded port must be allowed to pass free (Article 16).*

Stress is thus laid primarily upon a proper declaration and a proper notification of that declaration, and the declaration and notification are distinguished as two separate things, though in practice the distinction does not appear to amount to very much, as the declaration until made to the persons affected, or, in other words, notified, has no operative effect, so far as neutrals are concerned.

22. The distinction between a diplomatically notified and a *de facto* blockade is recognised, as by the joint effect of Articles 8, 11 and 16, a blockade is binding if notified by a communication to neutral Governments and local authorities, and also if notified on the spot to a vessel which has no actual or presumptive knowledge of its existence. Knowledge is presumed (Article 15) if the vessel left a neutral port subsequently to the diplomatic notification, if such notification was made in sufficient time: knowledge is, of course, actual if the vessel has been previously stopped and duly warned.

The rule that knowledge is presumed if the vessel sailed subsequently to and a sufficient length of time after diplomatic notification is in accordance with the British practice, as illustrated in the cases of the *Neptunus*<sup>1</sup> and the *Jonge Petronella*,<sup>2</sup> but no provision is made for the British principle, that knowledge is presumed even of an unnotified blockade, by reason of its general notoriety at the place from which the vessel last sailed.<sup>3</sup> Indeed this principle is implicitly negatived by the provisions as to notification contained in Article 8; and in view of the development of the

<sup>1</sup> 2 C. Rob. 110 (1799).

<sup>2</sup> *Ibid.* 131 (1799). In this case the vessel was released because it had sailed only one week after notification, which seems a lenient view.

<sup>3</sup> The *Adelaide Rose*, 2 C. Rob. 111n. (1799). The *Union*, Spinks, 164.



## Notification.

means of communication, and the inherent difficulties of applying the principle, with the necessary qualification that the notice to be inferred from notoriety must be such that if conveyed by a distinct intimation it would be binding,<sup>1</sup> the disappearance of this rule will probably in practice make little difference.

23. The custom of allowing neutral vessels time to leave is now made obligatory, it being understood that the time allowed is to be reasonable:<sup>2</sup> but this, of course, only applies to vessels in the port at the time of the institution of the blockade. It is the duty of the officer commanding the blockading squadron to notify the blockade to the authorities of the blockaded port (Article 11 (2)): if he by negligence fails to do so, or fails to specify the period within which vessels may come out, he must allow neutral vessels to pass out (Article 16). But if there was no negligence on his part, and it was impossible to notify the local authorities, owing to the fact that they had intercepted all communications,<sup>3</sup> then it seems that a neutral vessel without knowledge, actual or presumptive, of the blockade need not be allowed to pass. It may not, apparently, be captured, but it must be specially notified and turned back. Such a vessel is in a worse position, therefore, than a vessel similarly ignorant, which attempts to pass through from outside: and on this account it is probable that the duty of the commander to notify the local authorities will be strictly construed, and he will be required to prove that the local authorities, and not merely the state of the weather or the distance of the blockading squadron, were to blame.

24. It is to be noted that, in Article 15, the words 'neutral port' are used. It may, however, probably be taken for granted that a neutral vessel leaving an enemy port, or a port of the blockading belligerent, is *a fortiori* presumed to be affected with notice: and it was considered superfluous to require a notice by the blockading power to its enemy, or to those, whether subjects or neutrals, in its own territories. But if, in fact, the neutral vessel can prove that it left a port of the blockading belligerent before any notice of the blockade had reached that port, it should be in no worse

<sup>1</sup> The *Franciska*, 10 Moore P.C.C. 58.

<sup>2</sup> Report of Drafting Committee on Articles 9 and 16.

<sup>3</sup> *Ibid.*, Article 16.

position than if it had left a neutral port in similar circumstances. Obviously the blockading belligerent cannot rely on a notice which it had not yet made public in its own territories : but it cannot be blamed for similar neglect on the part of the enemy.

Notification.

25. The difference in practice as to the notice necessary was accompanied by a similar difference as to the time when, and the place where the offence of breaking blockade was committed and the neutral vessel could be seized. It followed from the French doctrine as to notice that the vessel could not be liable until it reached the line of the blockade :<sup>1</sup> and from the British doctrine that the act of sailing with the intention of getting through to the blockaded port constituted the offence,<sup>2</sup> a rule which was, however, relaxed in special circumstances,<sup>3</sup> while in practice 'an attentive examination of all the reported cases in the British prize courts relative to questions of blockade has shown that, while the principle of liability to seizure at any point of a voyage to or from a blockaded port or coast has been maintained in theory, there is, in fact, no such case in which a vessel has been condemned for breach of blockade except when actually close to, or directly approaching, the blockaded port or coast.'<sup>4</sup>

Limits of Liability to Seizure.

Little alteration, therefore, was made by Article 17 :—

*'Neutral vessels may not be captured for breach of blockade except within the area of operations (rayon d'action) of the war ships detailed to render the blockade effective.'*

26. The 'area of operations' was explained, and, so far as possible, defined in a statement submitted on behalf of the French Government officially adopted by the Conference as a commentary upon Article 17 and incorporated in the official Report :—

Area of Operations.

'When a Government decides to undertake blockading operations against some part of the enemy coast, it details a certain number of war ships to take part in the blockade, and intrusts the command to an officer, whose duty is to use them for the purpose of making the blockade effective. The commander of the naval force thus formed

<sup>1</sup> Woolsey, *International Law*, 5th ed. p. 359.

<sup>2</sup> Lawrence, *Principles of International Law*, p. 591.

<sup>3</sup> *The Betsey* (1799), 1 C. Rob., p. 332.

<sup>4</sup> Instructions to British Delegates at the Conference of London.



Area of Operations.

posts the ships at his disposal according to the line of the coast and the geographical position of the blockaded places, and instructs each ship as to the part which she has to play, and especially as to the zone which she is to watch. All the zones watched taken together, and so organised as to make the blockade effective, form the area of operations of the blockading naval force.

'The area of operations so constituted is intimately connected with the effectiveness of the blockade, and also with the number of ships employed on it.

'Cases may occur in which a single ship will be enough to keep a blockade effective—for instance, at the entrance of a port, or at the mouth of a river with a small estuary, so long as circumstances allow the blockading ship to stay near enough to the entrance. In that case the area of operations is itself near the coast. But, on the other hand, if circumstances force her to remain far off, one ship may not be enough to secure effectiveness, and to maintain this she will then have to be supported by others. From this cause the area of operations becomes wider and extends further from the coast. It may, therefore, vary with circumstances, and with the number of blockading ships, but it will always be limited by the condition that effectiveness must be assured.

'It does not seem possible to fix the limits of the area of operations in definite figures,<sup>1</sup> any more than to fix beforehand and definitely the number of ships necessary to assure the effectiveness of any blockade. These points must be settled according to circumstances in each particular case of a blockade. This might perhaps be done at the time of making the declaration.

'It is clear that a blockade will not be established in the same way on a defenceless coast as on one possessing all modern means of defence. In the latter case there could be no question of enforcing a rule such as that which formerly required that ships should be stationary and sufficiently close to the blockaded places: the position would be too dangerous for the ships of the blockading force which, besides, now possess more powerful means of watching effectively a much wider zone than formerly.

'The area of operations of a blockading naval force may be rather wide, but as it depends on the number of ships contributing to the effectiveness of the blockade, and is always limited by the condition that it should be effective, it will never reach distant seas where merchant vessels sail, which are, perhaps, making for the blockaded ports, but whose destination is contingent on the changes which circumstances may produce in the blockade during their voyage. To sum up, the idea of the area of operations, joined with that of

<sup>1</sup> As had been suggested by Japan (Cd. 4555, p. 162).

effectiveness, as we have tried to define it, that is to say, including the zone of operations of the blockading force, allows the belligerent effectively to exercise the right of blockade which he admittedly possesses, and, on the other hand, saves neutrals from exposure to the drawbacks of blockade at a great distance, while it leaves them free to run the risk which they knowingly incur by approaching points to which access is forbidden by the belligerent.<sup>1</sup>

27. By the decisions of the British courts, a vessel breaking blockade outwards was, in theory, liable to capture until the conclusion of her homeward voyage,<sup>1</sup> and by a ship not forming part of the blockading force.<sup>2</sup> In the words of Sir W. Scott in the *Welvaart van Pillaw*: 'If the principle is sound that a neutral vessel is not permitted to come out of a blockaded port with a cargo, I know no other natural termination of the offence but the end of that voyage. It would be ridiculous to say, if you can but get past the blockading force you are free.'<sup>3</sup>

On this point the French doctrine was thought by Hall<sup>3</sup> to be in accord with that of Great Britain and the United States: but in the French Memorandum submitted to the Conference,<sup>4</sup> the rule was laid down that ships breaking blockade could only be seized within the area of operations of the blockading force, and that a ship which has crossed the line of blockade is liable to capture so long, but only so long, as it is pursued.

At the Conference the British view was not insisted upon, the Government being of the opinion (on the ground that in practice vessels had never been captured at a great distance) 'that the acceptance of the latter (*i.e.* the French) view, would not be likely to inflict any material injury on the interests of Great Britain.'

28. Article 17, already set out, would appear in itself to make it no longer possible for a vessel which has broken blockade outwards to be captured at a distance from the area of operations by a vessel not forming a part of the blockading squadron: but the case of the breach of blockade outwards

<sup>1</sup> *Welvaart van Pillaw*, 2 C. Rob. 128 (1799). In this case the vessel broke the blockade of Amsterdam outwards, and was captured off Dungeness; *General Hamilton*, 6 C. Rob. 61 (1805). In this case the vessel had broken blockade outwards from the Seine, and was driven into a British port where she was captured.

<sup>2</sup> *The Juffrow Maria*, 3 C. Rob. 153 (1800).

<sup>3</sup> Hall, 6th ed. p. 712.

<sup>4</sup> Misc. No. 5 (1909), Cd. 4555, p. 30.



Termination of  
the Offence.

was specifically dealt with, and provision was made for the case of pursuit, by Article 20:—

*'A vessel which has broken blockade outwards, or which has attempted to break blockade inwards, is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected.'*

Termination of  
Blockade.

29. When a blockade is ended, it can only be resumed on observance of all the formalities of a fresh blockade. A blockade, as has been stated, on p. 263, is not ended by the temporary withdrawal of the blockading force, owing to stress of weather, nor by the occasional success of blockade-runners. It is ended when the war ends, when the blockading squadron is driven off by a superior force,<sup>1</sup> or is withdrawn for some other service, or if it is declared to have been raised, or if the blockading power occupies the blockaded territory<sup>2</sup> (though in the *Circassian*<sup>3</sup> this doctrine was disputed by the United States courts till re-enunciated by the Mixed Commission under Article XII. of the Treaty of Washington), or if for any reason the blockade is not effectively maintained, or impartially enforced.<sup>4</sup>

It was urged by the United States in 1861<sup>5</sup> that a notified blockade continued till notification of its termination: but the claim cannot be put higher than this, that a notified blockade is presumed to continue, and if it has ended it lies upon the neutral vessel to prove that fact.

30. On this question of the termination of a blockade, the Conference contented itself with requiring, by Article 13, formal notification of the voluntary raising or restriction of a blockade. As is pointed out,<sup>6</sup> there cannot be any penalty for failure to make such notification, as there is in the case of failure to notify the establishment of a blockade. Little more than diplomatic remonstrances could follow: but what was previously regarded as an act of courtesy to be expected of the belligerent, is now raised to the level of an international

<sup>1</sup> The *Hoffnung*, 6 C. Rob. 112, 117 (1805). The *Triheten*, 6 C. Rob. 65, 67 (1805).

<sup>2</sup> Lawrence, p. 585.

<sup>3</sup> 2 Wall. 135.

<sup>4</sup> The *Circassian*, Moore, *International Arbitrations*, p. 3911; the *Hoffnung*, *supra*; the *Franciska*, 10 Moore P.C.C. 37.

<sup>5</sup> Hall, 6th ed. p. 706-7.

<sup>6</sup> Report of Drafting Committee, on Article 13.

duty. If, however, the area of a blockade is restricted, and ports A and B having been blockaded, the blockade of A is raised and that of B alone continued, then it would seem to follow that the failure to notify the raising of the blockade of A will invalidate the blockade of B. Termination of Blockade.

31. The penalty for breach of blockade is confiscation of the ship. Penalty. By the British rule the cargo will be confiscated if it belongs to the same owner as the ship, or the consignees of the cargo have such control of the ship as to constitute the master their agent;<sup>1</sup> if it belongs to a different owner it will be confiscated if at the time of shipment he knew, or might have known, of the blockade.<sup>2</sup> As a general rule, the master is not treated as the agent of the owner of the cargo in the same way as he is treated as the agent of the owner of the ship:<sup>3</sup> but in certain cases his acts may by inference bind the owner of the cargo, as, for instance, if he deviates to a port which, before the ship sailed, was known to be blockaded,<sup>4</sup> or gives a frivolous excuse for his deviation to a blocked port.<sup>5</sup>

Article 21 of the Declaration confirms the broad principle on which the British courts had acted :—

*'A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also condemned, unless it is proved that at the time of the shipment of the goods the shipper neither knew, nor could have known, of the intention to break the blockade.'*

32. The doctrine of continuous voyages has been fully dealt with in its relation to contraband. Continuous Voyage. By a supposed analogy with this doctrine, the American courts condemned vessels for breach of blockade when they were on their way to a neutral port, on the suspicion that their ultimate destination was a blockaded port,<sup>6</sup> holding that a voyage from a neutral to a belligerent port is one and the same voyage,

<sup>1</sup> *The Columbia*, 1 C. Rob. 154 (1799); and *cf.* *the Imina*, 3 C. Rob. 169 (1800); *the Rosalie and Betty*, 2 C. Rob. 343, 351 (1800).

<sup>2</sup> *Panaghia Rhomba*, 12 Moore P.C. 168 (1858).

<sup>3</sup> *The Adonis*, 5 C. Rob. 256, 261 (1804).

<sup>4</sup> Hall, 6th ed. p. 712; *the Adonis*, 5 C. Rob. 258; *the Mariana Flora*, 7 Wheaton, 57; *the Alexander*, 4 C. Rob. 93 (1801); *the Panaghia Rhomba*, 12 Moore P.C. 180.

<sup>5</sup> *The Alexander*, *supra*.  
<sup>6</sup> *The Circassian* (1864), 2 Wall. 135; *the Bermuda* (1865), 3 Wall. 515.



Continuous  
Voyage.

whether the destination be ulterior or direct, and whether with or without the interposition of one or more intermediate ports, and whether to be performed by one vessel or several employed in the same transaction and in the accomplishment of the same purpose.

This, as has been pointed out,<sup>1</sup> was not really an application of the doctrine of continuous voyage, but a dangerous relaxation of the rules of evidence. By the old rule laid down by the British and American courts, if it was proved that a vessel sailed with a destination to a blockaded port, she was liable to capture at any time after she had started, and it would make no difference that she was going first to a neutral port: the American innovation was the seizure of vessels without the proper evidence of an intention to enter the blockaded port, and even, as in the case of the *Stephen Hart* and the *Sprinkbok*,<sup>2</sup> on evidence that the cargo was to be unshipped at the neutral port and conveyed to the blockaded port by other means. The principles of these decisions have been severely criticised, and they were an extension of the rule as laid down in the British Manual of Naval Prize Law of 1888,<sup>3</sup> that when a vessel is ostensibly bound for 'a neutral or unblockaded enemy port, while she is in reality intended after touching there to go on to a blockaded port . . . her destination is held to be for the blockaded port from the time of sailing.'

33. With Article 17 restricting capture to the area of operations of the blockading force, the possibility of the question arising again practically disappears: but the point was further dealt with in Article 19:—

*'Whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade if at the moment she is on her way to a non-blockaded port.'*

This does not, of course, shut out proof that the destination to a non-blockaded port is only apparent, and that the blockaded port is the immediate destination.<sup>4</sup>

<sup>1</sup> Atherley Jones, *Commerce in War*, p. 255.

<sup>2</sup> 3 Wall. 559; 5 Wall. 1.

<sup>3</sup> Lawrence, p. 596.

<sup>4</sup> Report of Comment of Drafting Committee on Article 19.

## CHAPTER VI

### UNNEUTRAL SERVICE

1. UNDER this heading the Conference of London dealt with the carriage by neutrals of enemy passengers of a naval or military character, or enemy despatches, and with the direct participation of a neutral vessel in the service of a belligerent. This branch of the law is sometimes treated under the heading 'Analogues of Contraband': and the principle on which the prohibition of contraband rests is no doubt similar in its general character, but the analogy in its practical application is not very close. The destination of a noxious despatch or of noxious persons, for instance, may be a neutral port: and in carrying despatches or persons a neutral may have specially hired himself for the service, in which case he is more closely associated with the belligerent than a dealer in contraband, who merely seeks his best market: or he may be simply carrying them in the ordinary course of his business as a carrier of mails or passengers, in which case his association is far less close.

2. The case of despatch carrying presents few difficulties <sup>Despatches.</sup> and may be shortly dealt with. To adapt the language of Lord Justice Bowen in a well-known English case,<sup>1</sup> a despatch is not like a fire: a neutral may carry it about without being bound to suppose that it is likely to do an injury. The general principle, therefore, is that neutral vessels are prohibited from carrying, or carry at their peril, only those despatches of which they knew, or ought to have known, the military or naval character. Such knowledge will be presumed, therefore, if they are addressed to persons in the military or naval service, or to agents in a neutral state other than the accredited agents who would make peaceful communications

<sup>1</sup> *Emmens v. Pottle*, 16 Q.B.D. at p. 358.



Despatches.

in the ordinary course; but save in such and similar cases the presumption cannot arise.

In the *Atalanta*,<sup>1</sup> Lord Stowell condemned a ship bound for Bremen, which had touched at the Isle of France, a French colony, and taken on board a French officer and despatches from the governor to the Minister of Marine at Paris. The case was aggravated by an attempt to conceal the documents. The learned judge intimated his view of the gravity of the offence in the following passage:—<sup>2</sup>

‘How is the intercourse between the mother-country and the colonies kept up in time of peace? By ships of war or by packets on the service of the state. If a war intervenes, and the other belligerent prevails to interrupt that communication, any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does in fact place himself in the service of the enemy state. . . . Nor let it be supposed that it is an act of light and casual importance. . . . In the transmission of despatches may be conveyed the entire plan of campaign, that may defeat all the projects of the other belligerent in that quarter of the world. . . . It is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences in the operations of the enemy.’

In the *Caroline*<sup>3</sup> the despatches were being carried from the ambassador of the enemy's state resident in the neutral state to his own country. Lord Stowell directed restitution, basing a distinction on the character of the person engaged in the correspondence. He is not an executive officer of the Government, acting simply in the conduct of its own affairs within its own territories, but an ambassador resident in a neutral state, for the purpose of supporting an amicable relation with it.<sup>4</sup> In the *Madison*,<sup>5</sup> a consul-general was held to be in a similar privileged position, and the ship was restored, though ordered to pay the captor's expenses.

3. It was also laid down that force or fraud employed by the enemy provided no excuse to the master of the ship:<sup>6</sup> though

<sup>1</sup> 6 C. Rob. 440 (1808); cf. also the *Constantia*, 6 C. Rob. 461n. (1808).

<sup>2</sup> At p. 454.

<sup>3</sup> 6 C. Rob. 461; cf. the *Madison*, 1 Edwards 224.

<sup>4</sup> At p. 467.

<sup>5</sup> 1 Edwards 224.

<sup>6</sup> The *Caroline*, 4 C. Rob. 259 (1802), a case of carriage of troops; the *Susan*, 6 C. Rob. 461n. (1808); the *Orozembo*, 6 C. Rob. 436 (1807); the *Hope*, 6 C. Rob. 463n. (1808).

in one case, the *Rapid*,<sup>1</sup> a plea of ignorance on the part of Despatches. the master of the ship was allowed.

The penalty by the British rule was confiscation of the Penalty. ship and of the cargo, if the property of the same owners.<sup>2</sup>

In the above cases the ships condemned specially undertook the carriage of the despatches; and there were generally circumstances of fraud or concealment. It was argued by some writers,<sup>3</sup> and with reason, that the case is different with regular mail-boats, or merchant vessels which carry mails in the ordinary course: and in practice mail-boats have been treated with special consideration,<sup>4</sup> by the United States, for instance, during their wars with Mexico and Spain, by France during the Franco-German War, and by Great Britain during the Boer War, though such indulgence has not been even in recent years universal.

Postal correspondence was specifically dealt with by Articles 1 and 2 of Convention No. XI. of 1907.<sup>5</sup>

4. The Declaration of London by Article 45 dealt only with, and applied the recognised penalty only in cases where, the vessel specially undertakes the transmission of intelligence, which presumably includes the carriage of despatches:—

*'A neutral vessel will be condemned and will, in a general way, receive the same treatment as a neutral vessel liable to condemnation for carriage of contraband:—*

*'(1) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy, or with a view to the transmission of intelligence in the interest of the enemy.*

*'(2) If to the knowledge of either the owner, the charterer, or the master, she is transporting a military detachment of the enemy, or one or more persons who, in the course of the voyage, directly assist the operations of the enemy.*

*'In the cases specified under the above heads, goods belonging to the owner of the vessel are likewise liable to condemnation. The provisions of the present Article do*

<sup>1</sup> Edwards, p. 228.

<sup>2</sup> The *Atalanta*, 6 C. Rob. 455-60.

<sup>3</sup> Eg. Hautefeuille, *Droits des Nations Neutres*, II. p. 463; Calvo, see 2801.

<sup>4</sup> See Atherley Jones, p. 302.

<sup>5</sup> See p. 169, *supra*.



Despatches.

*not apply if the vessel is encountered at sea while unaware of the outbreak of hostilities, or if the master, after becoming aware of the outbreak of hostilities, has had no opportunity of disembarking the passengers. The vessel is deemed to be aware of the existence of a state of war if she left an enemy port subsequently to the outbreak of hostilities, or a neutral port subsequently to the notification of the outbreak of hostilities to the power to which such port belongs, provided that such notification was made in sufficient time.'*

Enemy persons.

5. The leading case on the carriage of enemy passengers is the *Orozembo*.<sup>1</sup> In that case an American vessel had been ostensibly chartered by a merchant at Lisbon to proceed in ballast to Macao, and there to take a cargo to America. He proceeded, however, to prepare it for the reception of three military officers and two persons engaged in civil occupations in the Government of Batavia. These five persons came on board, together with a lady and some servants, in all seventeen passengers. Lord Stowell condemned the vessel. He observed :—<sup>2</sup>

'In this instance the military persons are three, and there are, besides, other two persons, who were going to be employed in civil capacities in the Government of Batavia. Whether the principle would apply to them alone, I do not feel it necessary to determine. I am not aware of any case in which that principle has been agitated : but it appears to me, on principle, to be but reasonable that, whenever it is of sufficient importance to the enemy, that such persons should be sent out on the public service, at the public expense, it should afford equal ground of forfeiture against the vessel.'

The same judgment<sup>3</sup> may be cited as an authority for the proposition already referred to in the case of despatches, that a person engaged in the carriage of military persons cannot protect himself by alleging or proving his own ignorance, or fraud or force on the part of the enemy :—

'If the service is injurious, that will be sufficient to give the belligerent a right to prevent the thing from being done by enforcing the

<sup>1</sup> 6 C. Rob. 430 (1807).<sup>2</sup> *Ibid.*, p. 434.<sup>3</sup> At pp. 434-435.

penalty of confiscation. . . . If redress in the way of indemnification is to be sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger.' Enemy Persons.

In the *Friendship*,<sup>1</sup> the vessel was condemned for carrying almost exclusively a contingent of officers and sailors, whose passage was paid for by the French Government: but in this case Lord Stowell expressed the opinion<sup>2</sup> that the penalty would not be enforced where persons, even in the naval or military service of the enemy, were merely travelling as private passengers in the ordinary way at their own expense. In other words, the ordinary passenger vessel is, it seems, in the same position with regard to persons as is the ordinary mail-boat with regard to despatches.

6. It is to be noted that Article 45 of the Declaration distinguishes between individual passengers, who bring condemnation upon the ship only if her voyage is undertaken specially with a view to their transport (*i.e.*, if it is not her usual service), and military detachments, or persons who, in the course of the voyage, directly assist the enemy (*e.g.*, by signalling), in whose case knowledge only need be proved. In the first case, the rule that ignorance of the master, or fraud or compulsion on the part of the enemy, is no defence, will probably continue to be applicable: in the second case it seems clearly excluded.

7. It is further to be observed that in sub-section (1) the persons contemplated are those who are 'embodied' (*incorporés*), and not merely about to be, or likely to be embodied, in the armed forces of the enemy. The word 'embodied' is in itself not free from ambiguity and the sense in which it is used is to be found in the Report of the Drafting Committee:—

'Does it include those individuals only who are summoned to serve in virtue of the law of their country, and who have really joined the corps to which they belong? Or does it also include such individuals from the moment when they are summoned and before they join that corps? The question is of great practical importance. Supposing the case is one of individuals who are

<sup>1</sup> 6 C. Rob. 422 (1807).

<sup>2</sup> At p. 429.



**Enemy Persons.** natives of a continental European country and are settled in America: these individuals have military obligations towards their country of origin; they have, for instance, to belong to the reserve of the active army of that country. Their country is at war and they sail to perform their service. Shall they be considered as embodied in the sense of the provision we are discussing. If we judged by the municipal law of certain countries, we might argue that they should be so considered. But, apart from reasons of pure law, the contrary opinion has seemed more in accordance with practical necessity, and has been accepted by all in a spirit of conciliation. It would be difficult, perhaps even impossible, without having recourse to vexatious measures to which neutral Governments would not unwillingly<sup>1</sup> submit, to pick out among the passengers in a vessel those who are bound to perform military service and are on their way to do so.<sup>2</sup>

**Duration of Liability to Capture.**

8. In the cases covered by Article 45, the liability to capture ends with the ending of the voyage: the service performed to the enemy being a single service analogous to the carriage of contraband. This is probably consistent with the British principle: for in the *Caroline*,<sup>3</sup> though it was held that a vessel is liable after the service has come to an end, this was only subject to the proviso that she is still subservient to the purposes of the belligerent.

Nothing was said in the Declaration as to the carriage of persons in the civil service of the enemy, so that the doubt expressed by Lord Stowell in the *Orozembo*<sup>3</sup> remains unresolved; unless, indeed, as seems probable, the true interpretation of the Article is that the carriage of such persons is in no case to be counted as a prohibited act. A consideration of Article 47,<sup>4</sup> in which there is a similar restriction to persons embodied in armed forces, suggests that such was the intention of the Declaration.

**Identification with the Enemy.**

9. The cases referred to in Article 45 are cases in which the neutral vessel is not so seriously involved in the service of the enemy as to forfeit her rights as a neutral. But there are acts of a more serious character which may have the result of practically identifying the vessel with the enemy. If, for instance, the neutral vessel is chartered by the

<sup>1</sup> *Sic.*, should be 'willingly.'

<sup>3</sup> 6 C. Rob. 430, 434 (1807).

<sup>2</sup> 4 C. Rob. 256 (1802).

<sup>4</sup> See p. 289, *infra*.

enemy to carry cargo or troops, and acts under the orders or direction of the enemy,<sup>1</sup> or if she takes any part in the hostilities, or being under the orders or direction of the enemy, is found in the immediate vicinity of the enemy fleet,<sup>2</sup> she may then be treated as an enemy ship.

The cases under this head are dealt with by Article 46:—

*'A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel:—*

*'(1) If she takes a direct part in the hostilities.*

*'(2) If she is under the orders or control of an agent placed on board by the enemy Government.*

*'(3) If she is in the exclusive employment of the enemy Government.*

*'(4) If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.*

*'In the cases governed by the present Article, goods belonging to the owner of the vessel are likewise liable to condemnation.'*

Under the third head come colliers accompanying the enemy fleet: the fourth head differs from sub-section (2) of Article 45, in that the case at present contemplated is that in which the vessel is wholly devoted to the service of the enemy for the time being, and the liability to capture continues so long as such service lasts.<sup>3</sup>

10. There was no unanimity among the delegates as to whether a vessel taking part in a trade which would have been closed to her but for the outbreak of hostilities, should

<sup>1</sup> The *Rebecca*, 2 Acton 119.

<sup>2</sup> A British ship, the *Kowshing*, was in 1894 sunk by the Japanese in these circumstances.

<sup>3</sup> This is in accordance with the decision in the *Caroline* (4 C. Rob. 256), referred to on p. 286, above.



Rule of War of  
1756.

be treated as liable under this Article: and consequently the question raised by 'The Rule of the War of 1756' was left an open one.<sup>1</sup>

A vessel liable under this section remains a neutral in so far that she has a right of appeal to the International Prize Court on the question whether her position and acts bring her under the section: but that preliminary point being found against her, the jurisdiction of the Court, so far as she is concerned, is ended. She is an enemy vessel, liable as such to be sunk: and the presumption is that the goods on board her are enemy goods, till a neutral establishes his ownership.

Treatment of  
Enemy Persons.

11. Articles 45 and 46 deal with the liability of the ship and cargo: but there remains the important question as to the treatment of the persons, sometimes incorrectly described as 'contraband persons,' who are found on board. That when the ship is taken in for adjudication these persons may be made prisoners of war is clear: but there will be many cases in which, though the capture of the individuals is justified, the ship is entitled to go free, and the hardship upon, say, a large mail steamer, which happens to be carrying, innocently, a few enemy persons, may be very great if it is interrupted in its voyage and taken into a belligerent port.

Some continental nations have claimed that the belligerent has a right to remove such persons from a neutral vessel, but Great Britain never admitted any such right, and had insisted upon the exceptional nature of a provision contained in the Convention for the 'Adaptation of the Principles of the Geneva Convention to Maritime War,'<sup>2</sup> by which a belligerent could claim the surrender of sick, wounded or shipwrecked men from hospital and other ships. At the Conference of London, however, the British Government expressed itself as willing to modify this attitude, and it was generally agreed that the interests of neutrals would be best served by allowing a belligerent to remove from a neutral vessel persons actually embodied in the armed forces of the enemy.

<sup>1</sup> See p. 218, *supra*.

<sup>2</sup> Art. 12 of Convention X. of 1907. This Convention has not yet (March 1911) been ratified by Great Britain.

Strictly speaking, the question did not come within the jurisdiction of the International Prize Court,<sup>1</sup> but for convenience an Article was inserted in the following terms:—

Treatment of  
Enemy Persons.

*'Any individual embodied in the armed forces of the enemy, who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel' (Article 47).*

12. The careful limitation of the persons who may be so dealt with to persons 'embodied in the armed forces of the enemy,' suggests, as we have already pointed out,<sup>2</sup> that the carriage of persons engaged in civil employment is not to be treated as an offence. The best-known case in which the question arose was the case of the *Trent* in 1861.<sup>3</sup> The excitement which followed upon this incident is well within the memory of many persons now alive. During the American Civil War an English vessel, the *Trent*, cleared from Havana for England *via* St. Thomas, having on board Messrs. Mason and Slidell, who had been appointed envoys from the Confederate States to France and England. Off the coast of Cuba the captain of the *San Jacinto*, an American frigate, boarded the *Trent* and removed the two envoys to his own vessel, whence they were transferred to prison. On these facts the British Government demanded the restoration of Messrs. Mason and Slidell. The United States acceded to the demand upon the ground that the ship should have been brought in for adjudication. Mr. Seward, however, in a long despatch which illustrates very happily the inconveniences to which a politician exposes himself who gets up his international law for the occasion, maintained that the seizure was in other respects good, and that Messrs. Mason and Slidell were a species of contraband. If they were, the reply was obvious and decisive, that the *Trent* had a neutral destination: 'It is of the very essence of the definition of contraband' said Lord Russell in his answer, 'that the articles shall have a hostile and not a neutral destination.' But in fact it can only lead to confusion to apply the term contraband to persons at all. A few treaties have referred to soldiers and sailors as contraband: but it would be absurd to insist that

The *Trent* Case.

<sup>1</sup> Cf. Art. 3 of Convention XII. of 1907; and see p. 222, *supra*.

<sup>2</sup> See p. 286, *supra*.

<sup>3</sup> *Parl. Papers*, 1862, vol. lxii.



*The Trent Case.* a belligerent shall prove strictly an enemy destination, before he can prevent a neutral from conveying a regiment of the enemy's troops. The real issues which should have been argued were first : 'Were Messrs. Mason and Slidell noxious persons, by the carriage of whom the *Trent* had entered for the time being into the service of the enemy' : and secondly, 'If they were such persons, was the *San Jacinto* entitled to seize them and remove them from the *Trent*, without taking the vessel in for adjudication?' On the first point the captors may have had some ground for argument in the fact that the Confederate States, not having yet been recognised as a sovereign state,<sup>1</sup> the two envoys were going on a mission to persuade England and France to accord such recognition, and were therefore engaged in a service of a distinctly hostile character : but against this is to be set the argument that if they came as diplomatic agents (had the Confederates been already recognised, they would have been formally ambassadors), it is difficult to see how it was a breach of neutrality to convey them, for though Lord Stowell in the *Caroline*<sup>2</sup> said, 'you may stop the ambassador of the enemy on his passage,' that only meant that you may do so if you can do it without trespassing on neutral soil or ships.<sup>3</sup> On the second point, if the captors were entitled to seize the envoys at all, they were, in taking them out of the *Trent*, instead of taking the *Trent* in for adjudication, only doing what is now regarded as reasonable and convenient in the interests of all parties. In seizing them and allowing the vessel to proceed, they met the very point which Sir William Harcourt<sup>4</sup> urged against them :—

'The great and practical danger of the fallacious reasonings of Mr. Seward consists in this, that they would serve to justify, and may be taken to encourage, the captain of the *Túscarora* to seize the Dover packet-boat and carry her into New York for adjudication, in case Messrs. Mason and Slidell should take a through ticket for Paris.'

The defect in this criticism lies in the fact that it begs the whole question in issue, for, strictly speaking, if these

<sup>1</sup> Lawrence, *International Law*, p. 636 ; Atherley Jones, *Commerce in War*, pp. 312-13.

<sup>2</sup> 6 C. Rob. 468.

<sup>3</sup> Atherley Jones, *Commerce in War*, p. 313.

<sup>4</sup> *Letters on International Law*, p. 192.

envoys were noxious persons, or if they had been military officers, that is exactly what the *Tuscarora* would have been entitled to do: and it was precisely this difficulty which Article 47 of the Declaration was intended to meet.

The whole question of the *Trent* incident has been much discussed, and opinion is by no means unanimous, even at the present day: but it may be said with some confidence that under the terms of the Declaration of London, Messrs. Mason and Slidell would not be liable to seizure at all: but that assuming they were so liable, then the belligerent would be justified in arresting them and allowing the vessel to proceed.



## CHAPTER VII

### I. FREE SHIPS, FREE GOODS. II. ENEMY SHIPS, ENEMY GOODS

I. THESE maxims have been so often treated together that it may, perhaps, be worth while to preserve the collocation. There is, however, no necessary or logical connection between the two propositions, and they must be carefully distinguished to avoid confusion. The saying 'Free ships, free goods,' merely expressed the view that enemy goods shipped on neutral vessels ought to be immune from capture; while by the phrase, 'Enemy ships, enemy goods,' the opinion was conveyed that neutral goods shipped on enemy vessels were so tainted by their surroundings as to become liable to condemnation. In each case opinion was divided for many years, and in each case the view favourable to neutral privilege has finally prevailed. In the first case, therefore, the maxim stands: free ships make free goods, that is to say, a neutral vessel redeems the enemy quality of her cargo, so far as to protect it from capture. In the second case, the maxim has yielded to considerations based upon the intrinsic innocence of the cargo itself. It is therefore no longer true that carriage on a belligerent vessel necessarily affects neutral goods with a hostile character. Enemy ships do not make enemy goods, and, to put it shortly, the only goods, apart from contraband, which are now subject to confiscation, are enemy goods on enemy ships. A short account may usefully be added of the steps by which these conclusions have been respectively reached.

#### I. FREE SHIPS, FREE GOODS

2. Until the middle of the seventeenth century the simple view was adopted that enemy goods were enemy goods, and

as such, liable to capture, wheresoever found. From 1650 onwards a large number of treaties are found stipulating for the immunity of such goods, where found on neutral vessels. This concession was especially valuable to countries engaged in a large carrying trade, and the Dutch were particularly active in procuring its conventional adoption. It was not, however, contended that, apart from treaty, neutral ships were able to protect their cargoes, and in many cases, so far from the ship protecting the cargo, it was held that the cargo tainted the ship, and made it subject to capture. Acting upon this view several French *Ordonnances* declared that neutral ships carrying enemy cargoes were themselves confiscable.

Free Ships, Free Goods.

3. In the eighteenth century, France attempted to establish the principle of protection, but her own maritime superiority led Great Britain to maintain the liability of the goods to seizure, though she did not attempt to involve the vessel in the fate of the cargo. The First Armed Neutrality in 1780 collectively issued an affirmation of the immunity of enemy goods, but the individual subscribers, in the course of mutual hostilities, soon abandoned their own principles. The reassertion of them by the Second Armed Neutrality was equally transient. In the earlier part of the nineteenth century practice was still fluctuating. The number of states which desired amendment was considerable, but the existing law was accurately stated by Mr. Dana<sup>1</sup> :—

‘The United States and Great Britain have long stood committed to the following points as in their opinion established in the law of nations :—

- ‘1. That a belligerent may take enemy’s goods from neutral custody on the high seas.
- ‘2. That the carrying of enemy’s goods by a neutral is no offence, and consequently not only does not involve the neutral vessel in penalty, but entitles it to its freight from the captors as a condition to a right to interfere with it on the high seas. While the Government of the United States has endeavoured to introduce the rule of free ships, free goods, by conventions, her courts have always decided that it is not the rule of war.’

<sup>1</sup> Note to Wheaton, § 475, cited by Hall, 6th ed. p. 692*n*.



Free Ships, Free  
Goods

4. The military association of Great Britain and France in the Crimean War furnished the occasion for the desired change. To secure uniformity of action England temporarily abandoned her practice and acquiesced, on the conclusion of peace, in the Declaration of Paris, which affirmed the principle of free ships, free goods. It will be remembered that the United States, Spain, Mexico, and Venezuela have not subscribed to this Declaration, but the United States recognised the neutral claim to protection in the Civil War, and the same course was adopted by both belligerents in the Spanish American War, and Spain formally acceded to the Declaration in 1907: while the refusal of the United States has not been due to any objection to the principle, but only to the refusal of the rest of the world to adopt the principle of immunity of all private property at sea. The principle of freedom from capture was duly observed by both parties to the Russo-Japanese War in 1904.

## 2. ENEMY SHIPS, ENEMY GOODS

5. The theory that goods of no warlike use to the belligerent were so affected by carriage in his vessels as to become confiscable, owed its survival to the fact that it was too readily accepted as the antithesis of the phrase, 'Free ships, free goods.' 'Free ships, free goods' was a reasonable concession to neutrals, which afforded no sort of justification for the infliction upon them of the hardship involved in 'enemy ships, enemy goods.' The practice expressed in the latter maxim, like commercial blockade, and the Rule of War of 1756 in its extended forms, proceeded on a view of neutral rights far too narrow to square with admitted principles of international law. The *Consolato del Mare*<sup>1</sup> denied the liability to capture of neutral goods in enemy bottoms, and the same view was expressed by Albericus Gentilis:<sup>2</sup> 'Property which does not belong to the enemy is nowhere confiscable.' England was, as a rule, on the same side, though occasionally the opposite principle was applied;<sup>3</sup> the weight of French policy was

<sup>1</sup> See Heffter, § 163.

<sup>2</sup> *De Jure Belli*, lib. ii. c. 22.

<sup>3</sup> Westlake, *International Law*, Part II. p. 126.

thrown into the opposite scale. Lord Stowell in the *Fanny*<sup>1</sup> drew a distinction between the cases where the carrying vessel was a public or a merchant vessel of the belligerent. 'A neutral subject,' he said,<sup>2</sup> 'is at liberty to put his goods on board a merchant vessel, though belonging to a belligerent, subject, nevertheless, to the rights of the enemy who may capture the vessel, but who has no right, according to the modern practice of civilised states, to condemn the neutral property. Neither will the goods of the neutral be subject to condemnation, although a rescue should be attempted by the crew of the captured vessel, for that is an event which the merchant could not have foreseen. But if he puts his goods on board a ship of force, which he has every reason to presume will be defended against the enemy by that force, the case then becomes very different. He betrays an intention to resist visitation and search, which he could not do by putting them on board a mere merchant vessel, and, in so far as he does this, he adheres to the belligerent; he withdraws himself from his protection of neutrality, and resorts to another mode of defence; and I take it to be quite clear, that if a party acts in association with a hostile force, and relies upon that force for protection, he is, *pro hac vice*, to be considered as an enemy.'<sup>3</sup>

Enemy Ships,  
Enemy Goods.

6. On the general question the American view coincided with the English, but in the *Atalanta*<sup>4</sup> Johnson, J., refused to follow the distinction insisted upon by Lord Stowell. The learned judge observed:<sup>5</sup> 'The principle of the law of nations, that the goods of a friend are safe in the bottom of an enemy, may be and probably will be changed . . . but so long as the principle shall be acknowledged this court must reject constructions which render it totally inoperative.' Nor did it make any difference that the belligerent vessel was an armed cruiser;<sup>6</sup> it was alleged, argued the learned judge, that the use of such a vessel by a neutral deprived the other belligerent of his right of search, or of capture, or of adjudication of goods, but the right of capture applied only to enemy ships or goods; the right of search to enemy goods on board a neutral carrier: nor was the right of adjudication

American View.

<sup>1</sup> 1 Dods. 443.

<sup>2</sup> Pp. 448, 449.

<sup>3</sup> At p. 415.

<sup>4</sup> At p. 448.

<sup>5</sup> 3 Wheaton 409.

<sup>6</sup> Pp. 424, 425.



Enemy Ships,  
Enemy Goods.

impaired. The neutral does not deny the right of the belligerent to decide the question of proprietary interest. If it be really neutral, of what consequence is it to the belligerent who is the carrier? He had no right to capture it, and if it be hostile, covered as neutral, the belligerent is only compelled to do that which he must do in all ordinary cases, subdue the ship before he gets the cargo.

Declaration of  
Paris.

7. The interest of these discussions is now chiefly historical, for at the time of the Crimean War France purchased the English adherence to the doctrine of free ships, free goods, at the price of a similar concession on her part in the practice under consideration, and the Declaration of Paris affirmed the English and the American view that neutral traders are in no way bound to refuse the convenience of belligerent carriage; in other words, that enemy ships do not make enemy goods.

8. It need hardly be said that a neutral trader, in one sense, acts at his peril in employing a belligerent carrier. If belligerent necessity impels the other belligerent to destroy the carrying vessel, the neutral probably has no remedy in respect of the concurrent destruction of his cargo. Destruction without such a real necessity would no doubt be a violation of the spirit of the Declaration of Paris, and, if a clear case be conceived, the neutral Government might effectively intervene. This question will be considered later, in relation to the destruction of prizes.<sup>1</sup>

<sup>1</sup> See chap. ix. *infra*.

## CHAPTER VIII

### VISIT AND SEARCH

1. BELLIGERENT public vessels are entitled to stop neutral merchantmen upon the high seas in order to determine their character and the nature of the occupation in which they are engaged. The existence of this right is peremptorily required to enforce the control over neutral trade which belligerents are permitted to exercise. In the English leading case, the *Maria*,<sup>1</sup> Lord Stowell dwelt upon this point of view :—

‘The right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destination, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destination what they may, because, till they are visited and searched, it does not appear what the ships or the cargoes or the destination are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle that no man can deny it who admits the legality of maritime capture; because, if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. . . . The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges.’

By Article 63 of the Declaration of London, it was provided that :—

*‘Forcible resistance to the legitimate exercise of the right of stoppage, search, and capture, involves in all cases the condemnation of the vessel. The cargo is liable to*

<sup>1</sup> 1 C. Rob. 359 (1799).



Forcible Resistance.

*the same treatment as the cargo of an enemy vessel. Goods belonging to the master or owner of the vessel are treated as enemy goods.'*

It is to be noted that the above consequences follow only from forcible resistance: for a mere attempt at flight there is no penalty, except that the vessel obtains no compensation if damaged or sunk, as was explained in the official Report.

As to the cargo, in case of forcible resistance, enemy cargo loses the protection of the neutral flag, and neutral cargo is presumed to be enemy till the contrary is proved. This is a mitigation of the British rule laid down in the *Maria*<sup>1</sup> that resistance involves the whole cargo in confiscation.

Convoyed Vessels.

2. The question has been much discussed whether neutral vessels are liable to search at the hands of a belligerent when they are sailing under convoy of a commissioned vessel of their own country. The Governments and writers of the Continent are pledged to the view that vessels so sailing must not be searched. This opinion cannot be supported by the most influential practice, and the principle on which it proceeds is at least open to question. The claim to immunity was first put forward on behalf of Sweden in the seventeenth century, and the Dutch shortly afterwards placed under convoy some merchant vessels sailing from Cadiz to Flanders, and ordered the convoy to resist any attempt at search. Obediently to these instructions, De Ruyter, who was in charge of the convoy, beat off an English squadron which attempted to exercise the right of search. The Dutch claim was revived in the middle of the eighteenth century, and led to a warm dispute between the English and Dutch Governments. In 1781 Sweden put forward a similar claim as against Great Britain, and on appeal to Russia, received from that power, for what it was worth, an assurance that the claim to immunity for convoyed vessels was covered by the principles of the armed neutrality. As Mr. Hall<sup>2</sup> points out, the practice of visiting such vessels had been universal until 1781, and the claim to exemption had only 'acquired such consistency and authority as it could gain by becoming a part of the deliberate policy of a knot of states possessing

<sup>1</sup> 1 C. Rob. at p. 377.

<sup>2</sup> 6th ed. p. 725.

very defined and permanent interests.' The Second Armed Convoyed Vessels. Neutrality laid down the principle of immunity, but the chief signatories of it soon fell short of their own standard.

3. The British view was well stated by Lord Stowell British and American View.  
in the *Maria*<sup>1</sup> :—

'The authority of the sovereign of the neutral country being interposed in any manner of mere force, cannot legally vary the rights of a lawfully commissioned belligerent cruiser. I say legally, because what may be given . . . to considerations of comity or of national policy are views of the matter which sitting in this court I have no right to entertain. All that I can assert is that legally it cannot be maintained that if a Swedish commissioned cruiser, during the wars of his own country, has a right, by the law of nations, to visit and examine neutral ships, the King of England, being neutral to Sweden, is authorised by that law to obstruct the exercise of that right with respect to the merchant ships of his country. . . . Two sovereigns may unquestionably agree, if they think fit, by special covenant that the presence of one of their armed ships, along with their merchant ships, shall be mutually understood to imply that nothing is to be found in that convoy of merchant ships inconsistent with neutrality. . . . But surely no sovereign can legally compel the acceptance of such a security by mere force.'

4. On this point, as on others, American judges are fully in agreement with our own, and Story, J., in the *Nereide*,<sup>2</sup> very forcibly observed : 'The law deems the sailing under convoy as an act *per se* inconsistent with neutrality, as a premeditated attempt to oppose, if practicable, the right of search, and, therefore, attributes to such preliminary act the full effect of actual resistance.' In practice, therefore, Great Britain and America are ranged on one side, France, Russia, Germany, Austria, Spain, Italy, Denmark and Sweden on the other. The real weakness of the continental claim is that it presupposes in the commanding officer of a convoy an intimacy of information as to the cargo of the vessels convoyed which has no correspondence with facts. However complete his good faith, how can such an officer affirm of his personal knowledge that none of the vessels convoyed has contraband goods or enemy despatches on board ?

In many treaties, however, and even in their instructions

<sup>1</sup> 1 C. Rob. at p. 360 (1799.)

<sup>2</sup> 9 Cranch. 440.



Convoyed Vessels, to naval officers,<sup>1</sup> the United States Government have adopted the contrary principle of exemption.

5. It is pointed out by Mr. Hall<sup>2</sup> that in practice convoys are not likely to be much employed under modern conditions of commerce, as vessels now vary very much in their speed, and it would be highly inconvenient to keep a body of them together. Further, the doctrine of the right to visit ships under convoy has not been enforced by Great Britain in any recent war,<sup>3</sup> and when by the Declaration of Paris enemy goods other than contraband could no longer be seized in a neutral vessel, the chief temptation to exercise the right disappeared, though it still remained important to seize contraband and enemy despatches. Mr. Hall<sup>4</sup> adds that the officer in command of the convoy cannot guarantee that a vessel under his charge does not intend to break blockade: but with the adoption by the Conference of London of the rule that neutral vessels may not be captured for breach of blockade except within the area of operations of the blockading squadron,<sup>5</sup> this point would become of little importance, and it cannot be suggested, nor is it suggested, that a convoy can protect blockade-runners found within the area.

Conference of  
London.

6. At the Conference of London there was a marked change in the attitude taken up by several of the nations represented. In their Memorandum Germany adopted the British principle; the United States (following their treaty practice rather than their case law) adopted the principle of exemption for convoyed vessels; Austria, while claiming exemption, regarded the point as open to doubt; and Spain, France, Italy, Japan, the Netherlands and Russia claimed exemption: while Great Britain, though denying the right of exemption in her Memorandum, was nevertheless anxious, on behalf of neutral trade, to restrict as far as possible the right of seizure of contraband, and treating the original British contention as having lost its importance, expressed herself as prepared to accept the French view, which was finally adopted in the following articles:—

*'Neutral vessels under national convoy are exempt from*

<sup>1</sup> Lawrence, *Principles of International Law*, p. 572; Glass, *Marine International Law*, p. 168.

<sup>2</sup> 6th ed. p. 730.

<sup>3</sup> See General Instructions to British Delegates, sec. 18, Cd. 4554.

<sup>4</sup> 6th ed., p. 729.

<sup>5</sup> Art. 17.

*search. The commander of a convoy gives in writing at the request of the commander of a belligerent war ship, all information as to the character of the vessels and their cargoes, which could be obtained by search' (Article 61).*

*'If the commander of the belligerent war ship has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in a report, of which a copy is handed to the officer of the war ship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels' (Article 62).*

7. It will be observed that complete reliance is placed on the conscientiousness of the neutral, and on his ability to know the nature of all the cargo which he is protecting; and any breach of duty in this respect is not within the cognizance of the International Prize Court, and can only be the subject-matter of diplomatic representations. The importance of this aspect of the question was recognised in the official commentary to Articles 61 and 62, which, as we have said, is probably to be regarded as an authoritative exposition of their meaning. Stress is laid upon the duty of the neutral to exercise a genuine supervision at the outset of, and throughout, the voyage; and it is recommended that, as an act of courtesy, an officer of the belligerent cruiser shall be allowed to be present at any search made in pursuance of Article 62. The change in the British attitude (with which change Germany, in spite of her Memorandum, concurred) was defended<sup>1</sup> by a desire to arrive at a unanimous conclusion, and to abandon an isolated attitude: whether it was wise may be open to doubt, but there is good ground for supposing that the point is no longer of much importance, and that with the definition and limitation of contraband, neutrals are not likely to take frequently upon themselves the expense and responsibilities involved in convoying their own merchant vessels.

<sup>1</sup> Misc. No. 5 (1909). Cd. 4555, p. 260



Formalities of  
Search.

8. When a commissioned vessel wishes to exercise the right of search, it is usual to fly the colours and fire off a gun, called the affirming gun, as a signal to the merchant vessel. The requirement that the affirming gun or semonce shall be fired, is common in continental practice, but is not peremptory, according to the British and American view. In the *Marianna Flora*<sup>1</sup> Story, J., delivering the judgment of the Court, made the following observations on this point:—

‘We are not disposed to admit that there exists any such universal rule or obligation of an affirming gun as has been suggested at the bar. It may be the law of the maritime states of the European continent already alluded to, founded on their own usages or positive regulations. But it does not hence follow that it is binding upon all other nations. It was admitted at the argument that the English practice is otherwise; and surely, as a maritime power, England deserves to be listened to with as much respect on such a point as any other nation.’

9. In the same case it was pointed out that although the right of search does not exist in time of peace, yet a cruiser has a right to approach a foreign vessel for purpose of observation; it was held further that the vessel approached is under no obligation to lie-by, but that she has no right to fire at a cruiser approaching upon a mere suspicion that she is a pirate, and if this be done the cruiser may lawfully repel force by force and capture her. In order to make the actual visit, an officer is usually sent on board the merchantman from the cruiser, but sometimes the master of the merchantman is summoned to bring his papers to the cruiser for examination. Capture of a vessel searched is considered to be legitimate where the papers are false or insufficient, and where the results of the visit make it certain, or at least highly probable, that the vessel is tainted by any of the forms of illegality which have been already considered.

<sup>1</sup> 11 Wheaton.

## CHAPTER IX

### THE DESTRUCTION OF PRIZES AND COMPENSATION

1. WHEN a belligerent captures a vessel belonging to the enemy Government or enemy subjects, it becomes on capture his own property, and he is entitled to deal with it as he pleases. Strictly he may destroy it, subject, perhaps,<sup>1</sup> to a liability, under Clause (3) of the Declaration of Paris, to make compensation for any neutral property which may have been on board. But systematic destruction of enemy prizes has been the exception,<sup>2</sup> and the general rule is that all prizes are brought in for adjudication, unless there are practical difficulties in the way of such a course. Such difficulties have been, for instance, distance from a port of the captor, the danger of compromising the safety of the captor's vessel or the success of the operations in which she is engaged, lack of men to form a prize crew, lack of provisions, or water, or disease.<sup>3</sup>

2. In the *Felicity*,<sup>4</sup> Lord Stowell stated that if it was impossible to bring in, the next duty was to destroy, an enemy ship, and held destruction to be justified by showing that the immediate service on which they (the captors) were engaged, that of watching the enemy's ship of war, the *President*, with intent to encounter her, though of inferior force, would not permit them to part with any of their own crew to carry her into a British port.

<sup>4</sup>Under this collision of duties, nothing was left but to destroy her, for they could not, consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's pro-

<sup>1</sup> See p. 304, *infra*; this liability has been disputed by France.

<sup>2</sup> Hall, 6th ed. p. 452. In 1812 the United States burnt all, and in the American Civil War the *Alabama* burnt most of the enemy ships captured.

<sup>3</sup> Atherley Jones, *Commerce in War*, p. 528.

<sup>4</sup> 2 Dodson 383 (1819); cf. also the *Actaon*, 2 Dodson 48 (1815).



Enemy Prizes. perty to sail away unmolested. If it is impossible to bring in, their next duty is to destroy enemy's property. Where doubtful whether enemy's property, and impossible to bring in, no such obligation arises, and the safe and proper course is to dismiss.'

3. In the *Leucade*<sup>1</sup> it was said that it might be 'justifiable or even praiseworthy' to destroy an enemy vessel; and the view of the American Courts was illustrated in the case of the *Admittance*<sup>2</sup>:—

'As a general rule, it is the duty of the captor to bring it (the captured vessel) within the jurisdiction of a prize court of the nation to which he belongs, and to institute proceedings to have it condemned. . . .

'But there are cases when, from existing circumstances, the captor may be excused from the performance of this duty, and may sell or otherwise dispose of the property before adjudication. And where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficient crew to man the captured vessel, or when the orders of his Government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country, and may afterwards proceed to adjudication in a court of the United States. But if no sufficient cause is shown to justify the sale, and the conduct of the captor has been unjust and oppressive, the court may refuse to adjudicate upon the validity of the capture, and may award restitution and damages against the captor, although the seizure as prize was originally lawful or made upon probable cause.'

The ship in this case had been sold, but it would appear that the reasoning is equally applicable in the case of destruction. It will be shown later how the suggestion contained in the last sentence above quoted was adopted by the Conference of London, as providing one of the chief safeguards against destruction of neutral vessels.

4. The French Court in 1872 went so far as to hold in the case of two German vessels, the *Ludwig* and the *Vorwärts*,<sup>3</sup> which had been destroyed, that no indemnity was payable to the owners of neutral goods which had been destroyed with the vessels:—

<sup>1</sup> Spinks, 217 (1855).

<sup>2</sup> *Jecker v. Montgomery* 13 Howard, 498 (1851)

<sup>3</sup> Calvos, 3033; Atherley Jones, *Commerce in War*, p. 298.

'The Declaration (of Paris) does not import that an indemnity can be demanded for injury which may have been caused to him either by a legally good capture of the ship or by acts of war which may have accompanied or followed the capture. . . . The destruction of the ships with their cargoes having taken place under orders of the commander of the capturing ship, because from the large number of prisoners on board no part of the crew could be spared for the navigation of the prize, such destruction was an act of war, the propriety of which the owners of the cargo could not call in question, and which barred all claim on their part to an indemnity.'

5. Russia, too, issued regulations and instructions in 1895, and again in her war with Japan, which authorised the destruction of prizes, whether enemy or neutral,<sup>1</sup> 'in exceptional cases, where the preservation of a captured vessel appears impossible, on account of her bad condition or entire worthlessness, the danger of her recapture by the enemy, or the great distance or blockade of ports, or else on account of danger threatening the ship which has made the capture or the success of her operations.' In the case of the sinking of the *Knight Commander* in 1905, a strong protest by the British Government produced an assurance that no more neutral vessels would be sunk; and in the similar case of the *Thea* in the same year, compensation was paid to its German owners.<sup>2</sup>

On principle, there can be little doubt that, if the right to capture private property at sea is conceded at all, the destruction of enemy prizes is justifiable, though some writers have regarded it as a barbarous practice:<sup>3</sup> the chief safeguard against it lies in the fact that it is not to the interest of the captor to destroy what is certain to become his own property, if such destruction can be avoided.

6. Some nations have, in mitigation of the extreme rigour of the right of destruction, adopted the principle of ransom, in accordance with which the master of the prize is allowed to buy back the vessel by giving a Ransom Bill to the captor and, usually, a hostage as collateral security. The British courts<sup>4</sup> held that an alien enemy having no *locus standi* could

<sup>1</sup> Report of Royal Commission on Supply of Food and Raw Material in Time of War, p. 25, 1905, Cd. 2643.

<sup>2</sup> As to destruction of neutral prizes, see *infra*, p. 306.

<sup>3</sup> E.g. Bluntschli (8672).

<sup>4</sup> *Anthon v. Fisher*, Doug. Rep., p. 649 n. (1781). And on the whole question see Atherley Jones, *Commerce in War*, p. 640 *seq.*



## Ransom.

not sue upon a Ransom Bill, payment being only enforceable indirectly through an action by the hostage for the recovery of his freedom :<sup>1</sup> and in 1782 ransoming was prohibited by statute<sup>2</sup> as against public policy, but under a later statute<sup>3</sup> power was reserved to issue regulations by Order in Council permitting or forbidding ransom contracts. The practice has been approved in the United States<sup>4</sup> and treated as an exception to the rule against trading between enemies: it is approved in France and Spain with limitations in the case of privateers<sup>5</sup>: but prohibited in Sweden, Denmark, Holland and Russia.

## Neutral Prizes.

7. The case, however, is very different when the prize is a neutral vessel. Here, as we have seen,<sup>6</sup> the general principle laid down by the British courts is that the vessel must be brought in for adjudication; and if this is impossible, then it must be released, even though there be a doubt whether it is neutral or enemy. But it has been recognised even by our own Courts that there may be exceptional cases in which the destruction may be justified though not without full compensation to the owner: if for instance a squadron of the enemy is near, so that it is impossible to put a prize crew on board, and to release the ship would mean that it might convey information to the enemy;<sup>7</sup> and from the cases the true rule seems to be, not that destruction is never permissible, but that the owner must always be compensated, however justifiable the destruction may have been from the belligerent point of view.<sup>8</sup> At the Second Peace Conference an attempt was made to arrive at an agreement on the question, but in vain. The Conference at London was more successful. On the general principle that it is the duty of the captor to take the prize in, there was practical unanimity among the nations represented at that Conference, and this agreement was embodied in Article 48:—

*'A neutral vessel which has been captured may not be destroyed by the captor: she must be taken into such*

<sup>1</sup> *The Hoop*, 1 C. Rob. 196, 201 (1799).

<sup>2</sup> 22 Geo. III. c. 25.

<sup>3</sup> The Prize Act, 1864 (27 and 28 Vict. c. 25); and *cf.* the Naval Prize Bill, 1910, sec. 40.

<sup>4</sup> *Goodrich v. Gordon*, 15 John 6 (1818); and *cf.* *Maissonaire v. Keating*, 2 Gall. 325 (1815), in which the principle is approved when applied between belligerents and neutrals.

<sup>5</sup> *Atherley Jones, Commerce in War*, p. 641.

<sup>6</sup> P. 304, *supra*.

<sup>7</sup> *The Acteon*, 2 Dods. 48 (1815).

<sup>8</sup> *Cf.* the *Felicity*, 2 Dods. 381 (1819). The *Leucade*, Spinks, 217 (1855)

*port as is proper for the determination there of all Neutral Prizes. questions concerning the validity of the capture.'*

8. It was the desire of Great Britain at the Second Peace Conference to make this rule absolute: and at the Conference of London, Austria, Japan and the Netherlands took up a similar attitude. It was agreed, however, that there were circumstances in which destruction might be justifiable; and the chief subject of contention was the character of these circumstances. Particular objection was taken by Great Britain and Spain to admitting inability to spare a prize crew as an excuse, as this would justify destruction in the majority of cases where the captor had no port of his own near at hand, and would involve great hardship to the passengers and crew of the prize, who would be exposed to the risks incurred on board a belligerent war ship.

The ultimate decision was in the nature of a compromise, which defined the circumstances in which destruction was permissible in such a way as to leave a wide discretion to the International Prize Court:—

*'As an exception, a neutral vessel which has been captured by a belligerent war ship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the safety of the war ship or to the success of the operations in which she is engaged at the time' (Article 49).*

9. The first condition thus is that the prize must be one which would be liable to condemnation. If, for instance, her offence is the carriage of contraband, the contraband must be, in value, weight, volume or freight, more than half her cargo;<sup>1</sup> and she must have been aware of the outbreak of hostilities, or of the declaration of contraband applying to her cargo, under Article 43.<sup>2</sup> In view of the difficulty of estimating the proportion of the contraband without full inquiry, it is probable that this condition will make belligerents very cautious in the exercise of the right, and restrict the practice of destruction within very narrow limits.

With regard to the second condition, danger to the safety of the captor's ship, or its success, enumeration of particular

<sup>1</sup> Art. 40, on p. 254, *supra*.

<sup>2</sup> See p. 244, *supra*.



Neutral Prizes. circumstances not coming within these words was thought undesirable, as such enumeration could not be exhaustive, and would lead to the implication that all cases not mentioned were included. It follows that it is left to the Courts to deal with each case on its merits, and in view of the propositions put forward by several nations, there is no certainty that lack of a prize crew will not be regarded as an excuse for destruction. But in view of the words of the Article and of the official Report, the danger contemplated seems clearly an actual present danger of hostile attack. 'It is, of course, the situation at the moment when the destruction takes place which must be considered, in order to decide whether the conditions are or are not fulfilled. For a danger which did not exist at the actual moment of the capture may have appeared some time afterwards.'<sup>1</sup> It seems probable, therefore, that no court containing, as the International Court will contain, a majority of neutrals, will treat the danger as proved, except when the captor is operating with a hostile fleet in his neighbourhood. The British Delegates reported that 'the delegates representing those powers which have been most determined in vindicating the right to destroy neutral prizes, declared that the combination of the rules now adopted respecting destruction and liability of the ship, practically amounted in itself to a renunciation of the right in all but a few cases. We did not conceal the fact that this was exactly the object at which we aimed.'

Persons on Board. 10. Article 50 contained provision for the safety of the persons on the prize and for the preservation of the necessary evidence :—

*'Before the vessel is destroyed, all persons on board must be placed in safety, and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the war ship.'*

11. A further safeguard against reckless destruction is contained in Article 51 :—

*'A captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize,*

<sup>1</sup> Report on Art. 49.

*establish that he only acted in the face of an exceptional necessity of the nature contemplated in Article 49. If he fails to do this, he must compensate the parties interested, and no examination shall be made of the question whether the capture was valid or not.'*

Proof of Exceptional Necessity.

The result of this is that when a vessel is destroyed, the captor must first prove circumstances justifying its destruction, before the question of the liability of the vessel can arise at all; if he fails in that, he must compensate the vessel, however great her violation of the laws of neutrality. The converse case of a justifiable destruction but an invalid capture is dealt with in Article 52 :—

*'If the capture of a neutral vessel is subsequently held to be invalid, though the act of destruction has been held to have been justifiable, the captor must pay compensation to the parties interested, in place of the restitution to which they would have been entitled.'*

And neutral innocent goods on board must be paid for in any event :—

*'If neutral goods not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation' (Article 53).*

12. The provisions of Article 51 are substantially new, though they in effect adopt the suggestion made by the American Court in the *Admittance*,<sup>1</sup> and taken with the provisions of the other Articles on the subject, they provide in theory very effectually against reckless destruction by belligerents, and realise the aim of the British Government, which was to reduce the practice of destruction within the narrowest possible limits.

13. We have seen that by Article 44,<sup>2</sup> it was provided that a vessel not liable to condemnation because the contraband on board was less than the proportion of one half, might be allowed to go free, instead of being taken in for adjudication, if she were willing to hand over, and the captor were willing to receive, the contraband cargo. It was agreed to be un-

Destruction of Cargo.

<sup>1</sup> See p. 304, *supra*.

<sup>2</sup> See p. 255, *supra*.



Destruction of  
Cargo.

reasonable to compel the belligerent in all cases, where the neutral did not agree to hand over the contraband, to allow the vessel to proceed if he were unable to take her into port. It was decided, therefore, to give to the captor the right to seize and destroy the contraband if the circumstances were such that the vessel, if herself liable to condemnation, might with justification be destroyed :—

*'The captor has the right to demand the handing over, or to proceed himself to the destruction, of any goods liable to condemnation found on board a vessel not herself liable to condemnation, provided that the circumstances are such as would, under Article 49, justify the destruction of a vessel herself liable to condemnation. The captor must enter the goods surrendered or destroyed in the log-book of the vessel stopped, and must obtain duly certified copies of all relevant papers. When the goods have been handed over or destroyed, and the formalities duly carried out, the master must be allowed to continue his voyage.'*

*'The provisions of Articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable' (Article 54).*

Compensation.

14. It is convenient at this point to refer to the general provision contained in the Declaration of London, relative to cases where vessels or goods are seized and afterwards released :—

*'If the capture of a vessel or of goods is not upheld by the prize court, or if the prize is released without any judgment being given, the parties interested have the right to compensation, unless there were good reasons for capturing the vessel or goods' (Article 64).*

This principle is of general application, whatever the cause for which the capture was made: and it applies whether the release be after judgment or by the intervention of the executive.

15. The British Courts<sup>1</sup> have held that 'restitution may be attended with any one of the following consequences :—

<sup>1</sup> The *Ostsee*, 9 Moore P.C. 150 (1855); the *Leucade*, Spinks, 217; the *Acteon*, 2 Dods, 48, 51; the *Rufus*, 2 Dods, 48, 55.

- '1. The claimants may be ordered to pay to the captors Compensation. their costs and expenses.
- '2. The restitution may be simple restitution without costs or expenses or damages to either party, or
- '3. The captors may be ordered to pay costs and damages to the claimant.'

Each case must be decided on its own circumstances, and the ship will not obtain compensation if her capture was due to her own misconduct, or was made in circumstances of suspicion; but the captor must show reasonable and probable cause for the capture, and will not be excused by honest mistake.<sup>1</sup> The most important grounds of suspicion, which if not actually entailing in themselves confiscation, yet prevent the claimant from being treated with any leniency, are the possession of false or double documents, and the spoliation (destruction) of papers.<sup>2</sup> In the case of the *Allanton*, which has already been referred to,<sup>3</sup> the Russian court, with no justification, included among such grounds the fact that the vessel only stopped after two blank shots were fired, that her cargo was received at an enemy port, that she sailed on an unusual course, and that she had carried contraband on a previous voyage.<sup>4</sup>

By the Declaration of London, the questions of the circumstances is properly left to the decision of the court.

16. If the vessel or the cargo is released without being taken before a prize court at all, the practice of nations has been conflicting. National courts in some cases have, and in others have not, jurisdiction to entertain a claim for compensation based upon the ground that the capture would, on inquiry, have proved unjustifiable. The rule was laid down in the terms stated above: but in the Report explaining the rule, it is pointed out that 'if the action of the belligerent has been confined to the capture, it is the law of the belligerent captor which decides whether there are tribunals competent to entertain a demand for compensation, and if so, what are those tribunals: the International Court has not, according to the Convention of the Hague, any jurisdiction in such a case.

<sup>1</sup> The *Ostsee*, *supra*, at p. 162.

<sup>2</sup> The *Rising Sun*, 2 c. Rob. 106; the *Hunter*, 1 Dods, 487; the *Johanna Emilie*, Spinks, 22.

<sup>3</sup> See p. 236, *supra*.

<sup>4</sup> See Atherley Jones, *Commerce in War*, pp. 85, 86.



Release before  
Adjudication.

From an international point of view, the diplomatic channel is the only one available for making good such a claim, whether the cause for complaint is founded on a decision actually delivered, or on the absence of any tribunal having jurisdiction to entertain it.'

There was some discussion as to whether the compensation should include what were called indirect damages, such as loss of business: and it was finally agreed that no rule should be laid down, the International Prize Court being left to estimate the compensation at its discretion.

## CHAPTER X

### INTERNATIONAL ARBITRATION

1. 'AS regards myself,' said M. de Staal, in his closing speech as president of the Hague Conference of 1899, 'I who have reached the term of my career, and the downward slope of life, consider it as a supreme consolation to have seen the opening of new perspectives for the good of humanity, and to have been able to cast my eyes into the brightness of the future.'<sup>1</sup> M. de Staal spoke with a generous enthusiasm natural in one who had presided with dignity and success over a Congress in which many nations and many conflicting interests were represented. Perhaps the most clear-sighted estimate which appeared of the work of the Conference was that which was made by Mr. Holls, the American representative, in an interview with the able *Times* correspondent.<sup>2</sup> Mr. Holls pointed out that any one who was naïve enough to expect disarmament, or the establishment of an international supreme court, with an international police force to enforce its decrees, would undoubtedly be disappointed: and the result of the Second Conference has done nothing to modify this view. He added that the proposed treaty of arbitration was the best attainable result in the present state of public opinion all over the world. 'The formulating of the ideas of mediation and good offices, of arbitration, of international commissions of inquiry, and of procedure before courts of arbitration, is in itself a work of no small importance. . . . It will not prevent war where the question at issue is of such grave importance that the Government can, with the full approval of public opinion, disregard all the machinery which we have provided for its peaceful adjustment.'

2. A proposal for the limitation of armaments appeared in

<sup>1</sup> See the *Times*, Aug. 1, 1899.

<sup>2</sup> Aug. 1, p. 8.



Limitation of  
Armaments.

the forefront of the programme of the Conference of 1899, but in the final act of this Conference it had sunk to a resolution that the restriction of military charges was extremely desirable, and to a 'wish'<sup>1</sup> that the Governments, taking into consideration the proposals made at the Conference, might examine the possibility of an agreement as to the limitation of armed forces by land and sea, and of war budgets. From the programme of 1907 the subject had disappeared entirely, though the British Government were anxious that it should, at the least, be discussed:<sup>2</sup> but the Conference reaffirmed with emphasis the resolution of 1899, and in the course of its deliberations the British Government offered to communicate its naval programme as a basis for discussion each year to any power which would return the compliment — a proposition which was approved by the United States, France, Spain, and Russia, but has not as yet led to any practical result.<sup>3</sup> The difficulties of the problem have proved insuperable: and it may be conjectured with some confidence that whatever positive influence for good the Conferences may gain will be exercised in the manner indicated by Mr. Holls. Their highest utility will be found in the work of familiarising men's minds with the idea of arbitration in international matters, and with the imperative quality of the laws of war. As to the former, the value of the existence of a tribunal of inquiry was clearly demonstrated during the North Sea crisis of 1904. As to the latter, soldiers and jurists are alike agreed that the influence of the laws of war has infinitely relieved the horrors of the operations of war, without impairing the efficiency of those operations for crushing the armed resistance of the enemy: and their reassertion upon the authority of a great international council, formally representative of the armed forces of the world, marks an occasion of the highest significance. The agitation provoked by the use of expansive bullets in the Boer War illustrates the reality of what the Duc de Broglie called the moral effect of the Conference. The Dutch Republics were not represented at it, and the English representative did not sign the declaration proscribing the use of Dum-Dum bullets. It was, nevertheless, assumed by both belligerents that the employment of such bullets was an offence against international usage.

<sup>1</sup> *Vau* 4 of 1899.    <sup>2</sup> *Parl. Papers*, Misc., No. 1 (1908), p. 12.    <sup>3</sup> *Ibid.*

3. The Peace Conferences—to attempt a general summary of their results—disappointed the excessive hopefulness of those who foresaw in their convocation the beginning of—

General Results.

‘The Parliament of Man, the Fedration of the World.’

and repeated the quotation till it began to nauseate: but they rose far above ‘the cheap wit and shallow philosophy’ of those who predicted an unrelieved failure. The mere assembly of such Congresses, the harmonious progress of their deliberations and the weighty reserve of their pronouncements, mark the advent of a stage in international history which is likely to reduce the occasions of war, and is certain to mitigate the horror of struggles which it cannot prevent.

4. The chief practical achievement of these Conferences has undoubtedly been the establishment of a permanent machinery for dealing with international disputes. Such an institution was the logical and natural outcome of a tendency which had been gathering force for over a century to resort to arbitration as an alternative to war. That any arbitration has its limitations when the court has no power to enforce its award is obvious. It rests with the losing party to decide whether it will accept the award or not: and though it may be laid down that a decision may be disregarded ‘when the tribunal has clearly exceeded the powers given to it by the instrument of submission, when it is guilty of an open denial of justice, when its award is proved to have been obtained by fraud or corruption, and when the terms of the award are equivocal,’<sup>1</sup> the cases will be rare indeed in which the right to disobey will be clear beyond dispute. But behind the award there is always the sanctity (for what it may be worth) of an international treaty: and international public opinion will always have a restraining effect, and can seldom be entirely disregarded. Losing parties have, on the whole, honourably observed their obligations in the numerous arbitrations which have taken place during the past century: the action of the United States in 1831,<sup>2</sup> providing the only notable instance of a refusal to accept an award, while the settlement of the *Alabama* matter, of the Venezuelan Boundary question, of the North Sea incident and of the

Permanent Court of Arbitration.

<sup>1</sup> Hall, 6th ed. p. 355.

<sup>2</sup> *Ibid.*, p. 356.



Permanent Court  
of Arbitration.

Newfoundland Fisheries dispute, give reason to hope that the sphere of arbitration need not be confined to cases 'where the matter at stake is unimportant and the questions involved are rather pure questions of fact than of law or mixed fact and law.'<sup>1</sup> Any objections which may be raised against the *Alabama* award cannot be laid at the door of the principle of arbitration: the fault there rested not with the arbitration, but with the Treaty of Washington, which laid down the law by which the arbitrators were bound.<sup>2</sup>

Recovery of Con-  
tract Debts by  
Force.

5. Before dealing with the general provisions of the Hague Conventions on arbitration, it is necessary to refer to one particular point in which an attempt was made to reduce the possibility of war. In 1902 Great Britain, Germany and Italy having claims on behalf of their subjects against Venezuela on bonds and contracts, and for damages for injury, called upon that country to submit to arbitration, and receiving no satisfactory reply, seized the Venezuelan fleet and bombarded and blockaded several ports.<sup>3</sup> Dr. Drago, the Foreign Minister of the Argentine Republic, thereupon enunciated the doctrine which is associated with his name, 'that a public debt cannot give rise to the right of intervention and much less to the occupation of the soil of any American nation by any European power.' He prayed in aid the Monroe Doctrine;<sup>4</sup> but the United States did not respond wholeheartedly to the appeal. President Roosevelt in his presidential address in 1905, deprecated the enforcement of contractual debts by arms, and stated that it was contrary to the policy of the United States, but would not bind that country to do more than endeavour to bring about an arrangement when other countries were attempting to collect a just debt from an American State. The practice had in the past been uncertain; and Lord Palmerston, in 1848,<sup>5</sup> dealing with claims by British subjects who are holders of public bonds of foreign states, had claimed that it was clearly the right of any Government 'to take up, as a matter of diplomatic negotiation, any well-founded complaint which any of its subjects may prefer against the Government

<sup>1</sup> Hall, 6th ed. p. 355.

<sup>2</sup> See p. 199, *supra*.

<sup>3</sup> Pearce Higgins, *The Hague Peace Conferences*, p. 184 *seq.*

<sup>4</sup> See p. 59, *supra*.

<sup>5</sup> Hall, 6th ed. p. 276n.

of another country,' and that it was entirely a matter of discretion whether such action should be taken or not, and whether it should be followed by the employment of force. The Drago doctrine specifically referred to 'public debts,' as distinct from ordinary contract debts: inability to obtain payment of the latter through the courts of the debtor's country being presumably due to a defect in the administration of justice, for which the Government of that country is responsible. The non-payment of a public debt, it was in effect urged, stands in a different category. The Government is, of course, responsible, but such non-payment, being seriously against the interest of the debtor country, implies and brings with it such financial and political disturbance, that a small debtor nation ought not to be left at the mercy of intervention and occupation at such a time.<sup>1</sup> It was also pointed out that the creditor lends the money knowing, and on terms which take account of, the risks. The reasons, however, for the distinction seem inconclusive.

Recovery of Contract Debts by Force.

6. At the Conference in 1907 there was a general willingness to come to some arrangement on the subject, as well in the interest of the creditor as in that of the debtor; for the cost of the forcible collection of a debt is often extravagantly out of proportion to the amount at stake. The Convention finally took the following form:—

'The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its subjects or citizens.<sup>2</sup> This undertaking is, however, not applicable when the debtor state refuses or neglects to reply to an offer of arbitration or, after accepting the offer, renders the settlement of the *compromis*<sup>3</sup> impossible, or after the arbitration fails to comply with the award.'<sup>4</sup>

7. The above-mentioned distinction between public loans and contract debts does not appear in this, though insisted upon in a reservation made by the Argentine Republic<sup>5</sup>: and a proposal (made by Chile<sup>6</sup>) to include claims for damages for tort was not accepted. Certain states desired

<sup>1</sup> Pearce Higgins, *The Hague Peace Conferences*, p. 187.

<sup>2</sup> *Nationaux*. <sup>3</sup> See p. 322, *infra*.

<sup>4</sup> Art. 1 of Convention II. of 1907.

<sup>5</sup> *Parl. Papers*, Misc., No. 4 (1908), p. 424.

<sup>6</sup> *Ibid.* p. 425.



Recovery of Con-  
tract Debts by  
Force.

an insistence upon the creditor first exhausting the legal remedies available in the debtor country<sup>1</sup>: and Venezuela, whose position had raised the whole question, together with Nicaragua, Columbia, Uruguay, and Ecuador, demanded that no recourse to force should be allowed at all in the case of differences arising from pecuniary claims.<sup>2</sup> In fact, the general result was, that the states for whose benefit the Convention was presumably drafted either abstained from voting, or put in reservations which entirely altered its character: but it may be taken that all the larger powers will consider themselves bound by it, as there is not the provision, usual in these conventions, that it is only applicable as between the signatory powers, and when occasion arises, there is little doubt that any small power will, when pressed for payment of a debt, hasten to claim it as authoritative.

The Convention (No. II. of 1907) was ratified by Great Britain in November 1909.

Pacific Settlement  
of International  
Disputes.

8. At the Conference in 1899 there was drawn up the Convention for the Pacific Settlement of International Disputes, which was in 1907 enlarged and amended, chiefly in respect of certain matters of procedure on which experience had shown amendment to be necessary.<sup>3</sup>

Mediation.

The Convention begins with an undertaking by the powers to use their best efforts to ensure the pacific settlement of international differences<sup>4</sup> and to have recourse when possible to the good offices or mediation of friendly powers; while the offer of such mediation is declared expedient and desirable, and not to be regarded as an unfriendly act.<sup>5</sup> A few necessarily vague Articles define the duties of the mediator and make clear the purely advisory character of his position<sup>6</sup>: and a special form of mediation is recommended, by which the states at variance are to choose each a second state, and the states so chosen are, for the space of not more than thirty days, to endeavour to settle the dispute, while the states at variance stand aside and cease from all direct communication with each other.<sup>7</sup>

<sup>1</sup> *Parl. Papers*, Misc., No. 4 (1908), pp. 424-7.    <sup>2</sup> *Id.* pp. 426-7.

<sup>3</sup> Convention I. of 1899 and 1907.

<sup>4</sup> Art. I (the references throughout are to the 1907 Convention).  
Arts. 2, 3.

<sup>6</sup> Arts. 4-7.

<sup>7</sup> Art. 8.

9. After these preliminaries, provision is made for International Commissions of Inquiry. 'In disputes of an international nature, involving neither honour nor vital interests, and arising from a difference of opinion on points of fact, the Contracting Powers deem it expedient and desirable that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these disputes by elucidating the facts by means of 'an impartial and conscientious investigation.'<sup>1</sup> Such Commissions are to be constituted by special agreement between the parties defining the facts to be examined, the formation and powers of the Commission, its place of meeting, the language to be used and any other conditions agreed upon; the place of sitting to be the Hague if not otherwise fixed.<sup>2</sup> A number of detailed provisions, based largely on the experience gained at the North Sea Inquiry, were recommended<sup>3</sup> as to the appointment of Commissioners, agents, counsel, and secretariat, the pleadings and procedure, the calling of witnesses, and the taking of evidence upon commission: the continental rule that witnesses are to be examined by the president and not by counsel for the parties being adopted, a suggestion in favour of the English system not being pressed.<sup>4</sup> Speeches by counsel, though not forbidden, are not regarded as necessary. The proceedings are to be private, unless the Commission, with the consent of the parties, decides otherwise: this being thought preferable to a provision that the proceedings are public, with power to hear *in camera*.<sup>5</sup> The decision is by a majority of votes: and it is specifically explained that the Report being limited to a finding of fact, has in no way the character of an arbitral award, but leaves the parties entire freedom as to the effect to be given to the finding.<sup>6</sup> In settling the terms of these Articles, great caution was shown to use no words suggesting compulsion. It was, for instance, only 'deemed expedient and desirable' not 'agreed,' that Commissions of Inquiry be instituted,<sup>7</sup> and the Russian delegate, while suggesting the

<sup>1</sup> Art. 9.<sup>2</sup> Arts. 10, 11.<sup>3</sup> Care was taken to leave everything permissive, *Parl. Papers*, Misc., No. 4 (1908), p. 309.<sup>4</sup> *Ibid.*, pp. 513-14.<sup>5</sup> *Id.*, p. 314.<sup>6</sup> Arts. 12-36.<sup>7</sup> See *Parl. Papers*, Misc., No. 4 (1908), p. 305. Russia and Holland desired the word 'agreed.'



Commissions of  
Inquiry.

alteration, was emphatic in his recognition of the permissive character of the convention. Similarly a Russian amendment, which would have provided that after the decision of the Commission 'the powers at variance are free to conclude a friendly arrangement, or to have recourse to the Permanent Court of Arbitration,'<sup>1</sup> and by implication, would have forbidden war once the parties had gone before the Commission, was rejected, as being likely to restrict seriously the recourse to such Commissions.

10. There is, of course, nothing to prevent two powers from adopting different rules from those proposed, or from extending the area of the inquiry or the powers of the Commission.<sup>2</sup> In the one case in which such a Commission has proved its value, the matter in issue, the firing upon the British fishing fleet by Russian war ships in the North Sea in October 1904, was distinctly a dispute involving 'honour and vital interests': and it was referred to the Commissioners to determine where the responsibility lay, and upon the degree of blame affecting the nationals of Great Britain and Russia, or of other countries, in case their responsibility should be ascertained by the inquiry: the 'other countries' referring, of course, to Japan, who was alleged by Russia to have concealed torpedo boats in the fishing fleet.<sup>3</sup> An attempt was made by Russia in 1907 to include in the Convention a power to decide upon responsibility, in addition to mere questions of fact;<sup>4</sup> but it was thought wiser to leave this to the disputant powers, and not to do anything to obliterate the clear distinction between the functions of the Commission of Inquiry and of a Court of Arbitration.

Arbitration.

11. 'International arbitration has for its object the settlement of disputes between states by judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the award.'<sup>5</sup> The general principles being thus stated, the Conference in 1907 discussed at great length the possibility of making arbitration, in some cases at any rate, obligatory.<sup>6</sup> The principle of compulsory arbitration met with a universal and

<sup>1</sup> See *Parl Papers*, Misc., No. 4 (1908), p. 315.

<sup>2</sup> *Id.* p. 305.

<sup>3</sup> Pearce Higgins, *The Hague Peace Conferences*, pp. 167-8; and see p. 328, *infra*.

<sup>4</sup> *Parl. Papers*, Misc., No. 4 (1908), p. 305.

<sup>5</sup> Art. 37.

<sup>6</sup> *Parl. Papers*, Misc., No. 4 (1908), pp. 351-423.

warm approval: a large majority of the states represented were prepared to agree upon a list of subjects of what were vaguely described as 'a juridical order,' or disputes as to the interpretation of treaties, with the reservation, as a rule, of 'vital interests' or 'national honour;' but a strong minority led by Germany and Austria objected to anything in the nature of a universal treaty of compulsory arbitration, and preferred to reserve each case to be dealt with by a separate treaty as it arose. It was urged that a list was unnecessary, for almost all the items in the various lists proposed were of such a nature as to be extremely unlikely to lead in any event to war: and there was a marked reluctance to surrender in advance, and without consideration of the particular circumstances of each case, that independence which is one of the chief attributes of sovereignty. There being no chance of unanimity, the Conference fell back upon a restatement of the position which had been reached in 1899:<sup>1</sup> 'In questions of a juridical nature, and especially in the interpretation or application of International Conventions, arbitration is recognised by the Contracting Powers as the most effective and, at the same time, as the most equitable means of settling disputes which have not been settled by diplomatic methods.' To this was added: 'Consequently, it would be desirable that, in disputes on the above-mentioned questions, the Contracting Powers should, in that case, have recourse to arbitration, in so far as the circumstances permit': and compulsory arbitration was only referred to in an Article<sup>2</sup> in which the powers reserved 'the right of concluding new agreements, general or particular, with a view to extending compulsory arbitration to all cases which they may consider possible to submit to it.'

Compulsory  
Arbitration.

12. The rules of 1899, which established a Permanent Court of Arbitration, were in 1907 reaffirmed, amended, and extended. The powers undertook to maintain the Court, accessible at all times, and competent for all arbitrations,<sup>3</sup> at the Hague.<sup>4</sup> Provision was made for an international registry attached to the court, which keeps all documents and records,<sup>5</sup> and the staff of which is at the disposal of the powers for the use of any special board of arbitration.<sup>6</sup> Each power selects four

Permanent Court  
of Arbitration.

<sup>1</sup> Art. 16 of Convention I. of 1899: and Art. 38 of Convention I. of 1907.

<sup>2</sup> Art. 19 of Convention I. of 1899, and Art. 40 of Convention I. of 1907.

<sup>3</sup> Arts. 41, 42.

<sup>4</sup> Art. 43.

<sup>5</sup> Art. 43.

<sup>6</sup> Art. 47.



Permanent Court  
of Arbitration.

jurists as members of the court, who serve for six years, with power to be reappointed.<sup>1</sup> When an arbitration has been decided upon, the tribunal is chosen from this list by agreement, and may consist of one arbitrator or more,<sup>2</sup> and in default of agreement, each party appoints two arbitrators (of whom only one may be its national, or chosen from among the persons appointed by it as members of the Court), who choose an umpire; and in case of disagreement as to the choice of the umpire, he is, if certain other methods prescribed have failed, to be chosen by lot.<sup>3</sup> Diplomatic privileges and immunities are extended to the members of the tribunal in the performance of their duties.<sup>4</sup> The International Bureau is placed under the control of the Permanent Administrative Council, composed of the diplomatic representatives of the powers at the Hague and the Netherland Minister for Foreign Affairs, who settle all rules and questions of procedure and administration.<sup>5</sup> Subject to any agreement to the contrary between the parties,<sup>6</sup> the proceedings begin with a *compromis*, a document defining the subject of the dispute, the time allowed for appointing arbitrators, the form or order, and time for delivery of, pleadings, the amount to be deposited in advance to defray expenses, and all other matters, such as the language to be used;<sup>7</sup> and this *compromis* may be settled by the court if the parties agree to that course. It may also be settled by the court on the application of one of the parties, when all attempts to come to an agreement by the methods of diplomacy have failed; but only in the case of '(1) A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, and providing for a *compromis* in all disputes, and not either explicitly or implicitly excluding the settlement of the *compromis* from the competence of the court. Recourse cannot, however, be had to the court if the other party declares that, in its opinion, the dispute does not belong to the category of disputes which can be submitted to compulsory arbitration, unless the Treaty of Arbitration confers upon the Arbitration Tribunal the power of deciding this preliminary question; (2) A dispute arising from contract debts, claimed from one power by

<sup>1</sup> Art. 44.<sup>2</sup> Art. 55.<sup>3</sup> Art. 45.<sup>4</sup> Art. 46.<sup>5</sup> Art. 49.<sup>6</sup> Art. 57.<sup>7</sup> Art. 52.

another power as due to its subjects or citizens, and for the settlement of which the offer of arbitration has been accepted. Permanent Court  
of Arbitration.

This provision is not applicable if the acceptance is subject to the condition that the *compromis* shall be settled in some other way.<sup>1</sup> The tribunal for the purpose of settling the *compromis* in such a case is to be chosen as the arbitration tribunal is chosen in default of agreement.<sup>2</sup> When a Sovereign or Chief of a state is chosen as arbitrator, the procedure is settled by him.<sup>3</sup> The question of the language to be used, if not settled by the *compromis*, is to be settled by the tribunal.<sup>4</sup> The tribunal determines its own competence by interpreting the *compromis*, and the other documents which may be adduced.<sup>5</sup> The parties are entitled to employ special agents and counsel, but a member of the Permanent Court may not act as such except on behalf of the power which has appointed him a member;<sup>6</sup> a compromise between unrestricted freedom on the part of members to practise before the court, and total prohibition, which was arrived at in consideration of a dispute which arose on the subject during the Venezuela arbitration in 1904.<sup>7</sup> Provision is made for pleadings and oral arguments; and the time fixed by the *compromis* for delivery of pleadings may be extended by agreement, or by order of the tribunal when justice so requires.<sup>8</sup> The hearing is not public, unless it be so decided by the tribunal, with the assent of the parties.<sup>9</sup> Certain directions are laid down for the conduct of the hearing, as to the admission of fresh documents,<sup>10</sup> the power of the court to call for documents<sup>11</sup> and explanations,<sup>12</sup> the power of agents and counsel to raise objections and points, on which the decisions of the tribunal are final, and cannot form the subject of subsequent discussion<sup>13</sup>; and it was found desirable to enact that questions and remarks made by the tribunal during argument are not binding on the tribunal or on any member thereof.<sup>14</sup> The tribunal prescribes the conduct of the case;<sup>15</sup> and for the service of all notices by the tribunal in the territory of a third contracting power, and in the case of all steps taken in order to procure evidence,

<sup>1</sup> Art. 53.<sup>2</sup> Art. 54.<sup>3</sup> Art. 56.<sup>4</sup> Art. 61.<sup>5</sup> Art. 73; and see Pearce Higgins, p. 176.<sup>6</sup> Art. 62.<sup>7</sup> Pearce Higgins, p. 175.<sup>8</sup> Art. 63.<sup>9</sup> Art. 66.<sup>10</sup> Arts. 67, 68.<sup>11</sup> Art. 69.<sup>12</sup> Art. 69, 72, 75.<sup>13</sup> Art. 71.<sup>14</sup> Art. 72.<sup>15</sup> Art. 74.



Permanent Court  
of Arbitration.

the tribunal must apply direct to the Government of that power, and requests for this purpose are to be complied with, so far as the means which the power applied to possesses under its own laws allow, and they cannot be rejected unless the power in question considers them likely to impair its sovereign rights or safety.<sup>1</sup> The tribunal deliberates in secret, and its deliberations remain secret, all questions being decided by a majority.<sup>2</sup> The award states the reasons on which it is based; but is only signed by the President and the Registrar or Secretary, and no dissenting judgments are given;<sup>3</sup> this being an important amendment of the corresponding Article of 1899 (Art. 52), which provided for records of dissent and signature by each member. Disputes as to the interpretation or execution of the award are, in default of agreement to the contrary, to be referred to the same tribunal.<sup>4</sup> The *compromis* may reserve a right to demand a revision of the award, and in default of agreement to the contrary, the request for revision must be addressed to the same tribunal. Revision can only take place 'on the ground of the discovery of some new fact which is calculated to exercise a decisive influence upon the award, and which, at the time when the discussion was closed, was unknown to the tribunal, and to the party demanding revision.'<sup>5</sup> When there is a question as to the interpretation of a Convention of which other powers are signatories, such other powers must be notified, and are entitled to intervene; and the award is only binding on the parties to the proceedings, including such other powers as do in fact intervene.<sup>6</sup> Each party pays its own expenses, and an equal share of the expenses of the tribunal.<sup>7</sup>

It was also recognised by the contracting powers as a duty, if a serious dispute threatens to break out between two or more of them, to remind the disputants that the Permanent Court is open to them, such reminder to be regarded as in the nature of good offices: and it was provided that in case of dispute one of the disputants may always address to the International Bureau a declaration that it would be ready to submit the dispute to arbitration.<sup>8</sup>

<sup>1</sup> Art. 76.

<sup>5</sup> Art. 83.

<sup>2</sup> Art. 78.

<sup>6</sup> Art. 84.

<sup>3</sup> Art. 79.

<sup>7</sup> Art. 85.

<sup>4</sup> Art. 82.

<sup>8</sup> Art. 48.

13. There was further added in 1907 a series of articles<sup>1</sup> providing a summary procedure (additional to the procedure set out above) for the settlement of disputes in cases of a technical nature in which the parties desire not to be restricted to choosing arbitrators from the members of the Permanent Court: the proceedings being conducted entirely in writing, unless the parties ask that witnesses and experts be called, or the tribunal requires oral explanations.

14. In addition to adopting the above rules, the Conference of 1907 recorded the following *vaen*<sup>2</sup>:—‘The Conference recommends the Signatory Powers to adopt the annexed draft Convention for the creation of a Judicial Arbitration Court, and to bring it into force as soon as an agreement shall have been reached respecting the selection of the judges and the constitution of the court.’

The draft Convention referred to provided for the constitution (without derogation from the Permanent Court of Arbitration) of a court of judges, representing the various juridical systems of the world<sup>3</sup> and chosen if possible from the members of the permanent court. The appointments were to be for twelve years:<sup>4</sup> and the court was to elect annually by ballot three judges to form a special delegation, and three more to replace them if they were unable to act.<sup>5</sup> To secure impartiality, an oath was to be required<sup>6</sup> and it was provided that no judge should act judicially in any case in which he had taken part in the decision of a National Tribunal, of a Tribunal of Arbitration, or of a Commission of Inquiry, or had figured as counsel or advocate for one of the parties: and it was provided that a judge cannot act as agent or advocate before the Judicial Arbitration Court or the Permanent Court of Arbitration, or a Special Arbitration Tribunal or a Commission of Inquiry, nor act therein for one of the parties in any capacity whatsoever, so long as his appointment lasts.<sup>7</sup> Each judge was to receive a salary of 6000 Netherland florins (about £500) per annum, with an allowance of 100 florins a day while sitting:<sup>8</sup> and the court was to sit once a year and then dispose of all the cases on

<sup>1</sup> Arts. 86 to 90.

<sup>2</sup> Final Act of 1907, *Vaen* I. (Misc., No. 6 (1908), Cd. 4175, p. 15).

<sup>3</sup> Misc., No. 6 (1908), p. 128, Art. 1.

<sup>5</sup> Art. 6.

<sup>6</sup> Art. 5.

<sup>7</sup> Art. 7.

<sup>4</sup> Art. 3.

<sup>8</sup> Art. 9.



Judicial Arbitra-  
tion Court.

the agenda.<sup>1</sup> The delegation was, with the assent of the parties, to be empowered to decide arbitrations in accordance with the summary procedure provided for by Articles 86-97 of Convention I., or to hold an inquiry after the nature of the Commissions of Inquiry provided for by the same Convention: the judges who had acted on the Inquiry not being thereby debarred from acting as judges, if the case was subsequently submitted to the arbitration of the court or the delegation.<sup>2</sup> Power was given to the delegation to settle the *compromis* with the consent of the parties and, in certain cases, on the application of one party.<sup>3</sup> The procedure was in general to be that laid down in Convention I.:<sup>4</sup> and the court was only to be open to the Contracting Powers,<sup>5</sup> who were to bear the general expenses, the costs of the trial being borne by the disputants.

15. But in this draft Convention no provision was made for the actual constitution of the court, and it was by reason of the differences of opinion on this point that the Conference failed to arrive at any decision more conclusive than the 'wish' set out above. The object of this special court was explained in the Report to the Conference by the Commission by which the question was discussed.<sup>6</sup> It was of the essence of the Permanent Court set up by Convention I., that on each particular occasion the judges were arbitrators chosen, it is true, from a limited number, but chosen by the parties; and much stress was laid upon the importance to a nation of keeping control over the appointment of the persons by whose decision it was to be bound. But it was hoped that in relation to questions of a purely legal or 'juridical' nature, states might be willing to submit their differences to a court of judges more properly to be described as 'permanent,' appointed without reference to any particular dispute, sitting at regular periods, and prepared to apply to the cases brought before them something like a consistent body of law. The Permanent Court was not in fact permanent, for it had to be constituted for each occasion, and lacked the important element of continuity. It was also expensive, and between 1899 and 1907 it had only heard four cases. America put

<sup>1</sup> Art. 14.      <sup>2</sup> Art. 18.      <sup>3</sup> Art. 19.      <sup>4</sup> Art. 22.      <sup>5</sup> Art. 21.

<sup>6</sup> Misc., No. 4 (1908), Cd. 4081, p. 257 *et seq.*; and see Pearce Higgins *The Hague Peace Conferences*, p. 509.

forward a scheme which in its rough outlines was substantially the same as that ultimately adopted in the draft Convention :<sup>1</sup> and it was of the essence of this scheme that recourse to the new court should be purely permissive. The court was also to have an appellate jurisdiction to hear appeals from other tribunals, and particularly to examine the conclusions of Commissions of Inquiry and special arbitration tribunals. Russia suggested a small permanent committee, chosen from a larger panel of judges :<sup>2</sup> Germany approved heartily of the general principle, as did Great Britain and other and smaller states : but some of these latter at an early period made reservations as to the constitution of the court. The American proposal was subsequently withdrawn, and in its place was substituted a scheme drawn up by Germany, America, and Great Britain which, after a few modifications, became the draft Convention summarised above. But the insistence of the smaller states upon the absolute equality in all respects of all nations, and the refusal of the larger to admit this claim, made agreement impossible.<sup>3</sup>

Judicial Arbitration Court.

16. It will be useful to add a short summary of the cases which have been dealt with by the tribunals thus set up in 1899. The first case was that of 'The Pious Fund of the Californias,'<sup>4</sup> in which the Permanent Court, in 1902, decided in favour of the United States against Mexico, in a dispute concerning the interest of part of an old Roman Catholic charitable fund. The fund was originally given in trust for the benefit of the Californias, and was administered by Mexico. In 1848, part of the territory in question was ceded by Mexico to the United States : and the Roman Catholic Church in the ceded portion claimed its share of the proceeds of the fund. In 1878 an award had been made, on a reference to the British Minister at Washington as umpire, in favour of the claimants, and the amount was paid up to the year 1868 : and the United States, on behalf of the Church, claimed payment of the interest as from that date, contending, *inter alia*, that the matter was *res judicata* : a contention which was upheld.

Cases decided under the Convention.

The Pious Fund of the Californias.

<sup>1</sup> Misc., No. 4 (1908), p. 260.

<sup>2</sup> *Ibid.*, p. 261.

<sup>3</sup> See *Parl. Papers*, Misc., No. 4 (1908), Cd. 4081, p. 60 : and Pearce Higgins, pp. 514-517.

<sup>4</sup> See Pearce Higgins, pp. 44, 45 ; Smith and Sibley, *International Law as Interpreted during the Russo-Japanese War*, 2nd ed. p. 270.



Cases: The Venezuelan Debts.

17. In 1903 and 1904 the court decided a question of the right to preferential treatment of Great Britain, Germany and Italy as creditors of Venezuela, over her other creditors, including Belgium, Spain and France. The debts were admitted, and by agreement a proportion of certain customs revenues had been appropriated to meet them. The decision was in favour of the three former powers, who had, in 1902, taken active steps to secure payment by blockading the Venezuelan ports.<sup>1</sup>

The Japanese Loans.

18. In 1904 and 1905, Great Britain, France and Germany claimed as against Japan that certain lands granted to them under perpetual leases were free of all charges and taxes, whereas Japan claimed the right to levy a tax upon the buildings erected thereon. The decision of the Permanent Court in this case went against Japan.<sup>2</sup>

The Muscat Dhows.

19. In 1904 and 1905 a dispute came before the court between France and Great Britain in relation to the issue by France to subjects of the Sultan of Muscat, of authority to fly the French flag, and as to the privileges of persons so authorised:<sup>3</sup> and the decision was in favour of the power to grant such authority, but subject to important limitations, substantially conceding the British case.

The North Sea Incident.

20. All the above cases were decided by arbitrators chosen in accordance with the Convention setting up the Permanent Court: and they were on points of minor importance, dealing in two out of the four cases merely with money claims. By a curious and unexpected turn of events, the first really serious question, which might reasonably be said to involve 'honour and vital interests,' came before and was settled by the International Commission of Inquiry, whose scope had been so carefully limited and distinguished from that of an arbitration court. In October 1904 the Russian Baltic Fleet, on its way to the East, fired upon the Hull fishing fleet off the Dogger Bank, sank one vessel, killed two men and wounded several others; the explanation put forward being that Japanese torpedo boats were concealed among the fishing vessels. Great Britain prepared to take action, and

<sup>1</sup> See p. 109, *supra*; and Pearce Higgins, *The Hague Peace Conferences*, pp. 46, 47.

<sup>2</sup> Pearce Higgins, p. 48; Smith and Sibley, *International Law*, etc., 2nd ed. p. 271.

<sup>3</sup> Pearce Higgins, p. 48.

made immediate and urgent representations to the Russian Government, which, without admitting its commander to be in the wrong, expressed regret: and within the week the incident was referred to an International Commission under the rules of the Convention of 1899. The main question of fact was as to the presence of Japanese torpedo boats: and by the Convention signed at St. Petersburg on November 25, 1904, the two powers agreed 'to entrust to an International Commission of Inquiry, assembled conformably to Articles 9 to 14 of the Hague Convention of July 29, 1899, for the pacific settlement of international disputes, the task of elucidating, by means of an impartial and conscientious investigation, the question of fact connected with the incident which occurred during the night of October 21-22, 1904, in the North Sea, on which occasion the firing of the guns of the Russian fleet caused the loss of a boat and the death of two persons belonging to a British fishing fleet, as well as damages to other boats of the fleet and injuries to the crews of some of those boats.' The Commission was composed of five naval officers, one British, one Russian, two chosen by France and the United States and one by the Emperor of Austria: and the terms of reference extended beyond the mere question of fact:—'The Commission shall inquire into and report on all the circumstances relative to the North Sea incident, and particularly on the questions as to where the responsibility lies, and the degree of blame attaching to the subjects of the two high contracting parties, or to the subjects of other countries, in the event of their responsibility being established by the inquiry.' On February 26, 1905, the Commission issued its report, finding that no Japanese torpedo boat was present, and that the Russian admiral was not justified in firing, and the Russian Government paid compensation, amounting to £65,000, the Board of Trade Inquiry having assessed the damages at £60,000.<sup>1</sup> It is to be noted, however, that the Russian member of the Commission dissented from the award.

Cases: The  
North Sea Inci-  
dent.

21. The Permanent Court had before it in 1910 a question with regard to the right of fishing round the coasts of Newfoundland Fisheries.

<sup>1</sup> Pearce Higgins, pp. 167-169; Smith and Sibley, *International Law as Interpreted during the Russo-Japanese War*, 2nd ed., p. 481, where the text of the Report of the Commission is set out.



Cases: The Newfoundland Fisheries.

Canada and Newfoundland, which had been a matter of contention between Great Britain and Canada on the one hand, and the United States on the other, for over a century, and had at times brought these countries to the verge of war. By treaty in 1783, Great Britain granted to the United States, then admitted to be independent, the right of fishing on the banks and coasts of Newfoundland, in the Gulf of St. Lawrence, and on the 'coasts, bays and creeks' of all other British North American territory, but with no right of drying and curing fish on the Newfoundland shores.<sup>1</sup> There followed, after the war of 1812, the dispute to which reference has already been made,<sup>2</sup> as to whether this right did or not survive the war: a dispute which was settled by a treaty of 1818. By that treaty liberty was granted to the inhabitants of the United States for ever, in common with the subjects of Great Britain, to fish on certain defined parts of the coast of Newfoundland, on the shores of the Magdalen Islands, and on the coasts, bays, harbours and creeks from a spot on the southern coast of Labrador, through the straits of Belleisle, and thence northward indefinitely, but subject to the rights of the Hudson Bay Company. In return, the United States renounced for ever the right of fishing within three marine miles of all the rest of the coast of British North America. Out of the terms of this treaty several questions arose, which were the subject of long and dangerous disputes. The United States claimed a right to take fish by persons other than their 'inhabitants'; refused to pay dues for fog alarms and stations; denied that their ships were bound, on entering Canadian territorial waters, to enter and clear at Customs Houses: and claimed that all laws and regulations for the fisheries must be made jointly, and not by Great Britain or Canada alone. Further, by the treaty the United States had the right to fish on the coasts of Newfoundland, but on 'the coasts, bays, harbours and creeks' of Labrador: and Great Britain contended that the difference in wording prevented the United States from fishing in the bays, harbours and creeks of Newfoundland. Finally, the broad question was raised as to the meaning of the three-mile limit in relation to bays and gulfs: the United States maintaining that the line followed the sinuosities of the coast,

<sup>1</sup> Cf. Woolsey, *International Law*, 5th ed. p. 76.

<sup>2</sup> p. 105, *supra*.

as against the British contention that British jurisdiction extended three miles seaward from a line drawn between the outer headlands of a bay or gulf however wide.

Cases: The Newfoundland Fisheries.

22. The matter was referred to the Permanent Court at the Hague, which sat during June, July and August 1910. Seven questions were put before the court, and the general result of the award was as follows: The right of Great Britain (including Canada and Newfoundland) to make regulations without the consent of the United States as to the exercise of the liberty to take fish referred to in Article I of the treaty of 1818, in the form of municipal laws, ordinances or rules, is inherent in the sovereignty of Great Britain, but must be exercised subject to the limits laid down in the treaty, in that the regulations must be made *bona fide* and not in violation of the treaty: and regulations comply with this test which are (1) appropriate or necessary for the protection and preservation of the fisheries or (2) desirable or necessary on grounds of public order and morals, without unnecessarily interfering with the fishery itself; and, in both cases, equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class. The question of the reasonableness of particular regulations was left for the decision of a special tribunal of experts, or Permanent Mixed Fishery Commission, before which all objections made in future by the United States were to be laid.

23. On the second point it was decided that the inhabitants of the United States, while exercising their rights under the treaty, were entitled to employ as members of the fishing crews of their vessels persons not inhabitants of the United States; the persons so employed, however, to derive no benefit or immunity from the treaty. On the third question it was decided that the requirement that an American fishing vessel should report is not unreasonable, but only if there is a reasonably convenient opportunity afforded to report in person or by telegraph, at a Customs House or to a Customs official: that the exercise of the fishing liberty by the inhabitants of the United States should not be subject to the purely commercial formalities of report, entry and clearance at a Customs House, or to light, harbour, or other dues not imposed on Newfoundland fishermen. In the words of the recommenda-



Cases : The Newfoundland Fisheries.

tion accompanying the answer to Question III. 'to impose such dues on American fishermen only would constitute an unfair discrimination between them and Newfoundland fishermen, and one inconsistent with the liberty granted to American fishermen to take fish, etc, in common with the subjects of his Britannic Majesty.' The fourth point was somewhat similar : and it was decided that it was not permissible to impose restrictions upon American fishermen making the exercise of the privileges granted to them by the treaty to enter certain bays or harbours for shelter, repairs, wood and water conditional upon the payment of light or harbour or other dues, or entering or reporting at Customs Houses, or any similar conditions. But it was declared to be reasonable, in order to prevent the abuse of these privileges, which were declared to be accorded by Great Britain on the grounds of hospitality and humanity, that the American fishermen entering such bays for any of such purposes and remaining more than forty-eight hours should be required, if thought necessary by Great Britain or the Colonial Government, to report, either in person or by telegraph, to a Customs House or to a Customs official, if reasonably convenient opportunity for such report is afforded.

24. The fifth point raised wider issues and resulted in a decision which, while limited, of course, to the facts of the case, may form an international precedent of very considerable importance. The question was, 'What is a bay within the meaning of the treaty?' The decision was very general in its terms :— 'In case of bays, three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast.' But it was recognised that for practical purposes this rule was unfortunately vague : and the court made certain specific recommendations. 'Considering, moreover, that in treaties with France, with the North German Confederation and the German Empire, and likewise in the North Sea Convention, Great Britain has adopted for similar cases the rule that only bays of ten miles' width should be considered as those wherein the fishing is reserved to nationals ; and that in the course of the negotiations between Great Britain and the United States a similar

rule has been on various occasions proposed and adopted by Great Britain in instructions to the naval officers stationed on these coasts: and that though these circumstances are not sufficient to constitute this a principle of international law, it seems reasonable to propose this rule with certain exceptions, all the more that this rule with such exceptions has already formed the basis of an agreement between the two powers,' it was therefore recommended that as a general rule 'the limits of exclusion shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles':<sup>1</sup> while in a number of specified bays the line was drawn by the court, as a rule, from one lighthouse to another, on the general principle that 'where the configuration of the coast and the local climatic conditions are such that foreign fishermen, when within the geographic headlands, might reasonably and *bona fide* believe themselves on the high seas, the limits of exclusion shall be drawn in each case between the headlands specified as being those at and within which such fishermen might be reasonably expected to recognise the bay under average conditions.' From these rules two bays were expressly excluded, the Bay of Fundy and Conception Bay, and the right of innocent passage through the Gut of Canso which is not disputed.<sup>2</sup> The Bay of Fundy had been decided, on an arbitration under a Convention of 1853 between Great Britain and America, to be not a British bay within the meaning of fishery treaties between the two countries, it being very large and partly bordered by the State of Maine;<sup>3</sup> while Conception Bay was held to be British by the Privy Council in *The Direct United States Cable Coy. Ltd. v. The Anglo-American Telegraph Coy. Ltd.*,<sup>4</sup> a decision in which the United States had acquiesced.

25. On the sixth point it was decided that under the treaty the inhabitants of the United States were entitled to fish in the bays, creeks and harbours of the treaty coasts of Newfoundland and the Magdalen Islands, as they were in the bays, creeks

<sup>1</sup> This rule, found in the North Sea Fishery Convention of 1882, was suggested in the first draft of the Convention relative to Automatic Submarine Contact Mines (Convention VIII. of 1907). See Pearce Higgins, *The Hague Peace Conferences*, p. 333.

<sup>2</sup> Cf. Westlake, *International Law*, Part I. p. 193.

<sup>3</sup> See *Direct United States Cable Coy. Ltd. v. Anglo-American Telegraph Coy. Ltd.*, L. R. 2. A. C. 394, at p. 408.

<sup>4</sup> *Ibid.*

Cases: The Newfoundland Fisheries.



**Cases:** The Newfoundland Fisheries.

and harbours of Labrador. On the seventh point it was decided that the inhabitants of the United States, whose vessels resort to the treaty coasts for the purposes of exercising the liberties of fishing, are entitled to have for those vessels, when duly authorised by the United States on that behalf, the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading vessels generally; provided, however, that the liberty of fishing and the commercial privileges are not exercised concurrently.

The latest case to come before the Court was that of Savarkar, which has already been referred to in detail.<sup>1</sup>

<sup>1</sup> See p. 53, *supra*.

## APPENDIX A

### GUERRILLA WARFARE AND COMBATANT CHARACTER

THE sensitive humanity of some newspapers in the United States and many in Germany, appears to have been wounded by Lord Roberts's proclamations on the subject of guerilla warfare and its penalties on person and property during the Boer War. It is therefore interesting to inquire what are, or recently were, the opinions officially held in these countries on the subject under consideration. First of the United States. Section iv. Article 82 of the American instructions published in 1863, deals with the subject as follows :—

‘Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organised hostile army, and without sharing continuously in the war, *but who do so with intermittent returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers*—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.’

In view of this section, it may perhaps be assumed that the Boer raiders would hardly have fared better at the hands of an American army of occupation.

The complaints of the German press have been more bitter and unanimous ; it therefore becomes useful to recall the standard of military conduct adopted by Germany, when she was in occupation of French territory thirty years ago. On August 11, 1870, King William addressed a proclamation to the French people, from which the following extract may be given :—

‘L’Empereur Napoléon ayant attaqué par terre et par mer la nation allemande, qui désirait et désire encore vivre en paix avec le peuple français, j’ai pris le commandement des armées allemandes pour repousser l’agression, et j’ai été



amené par les événements militaires à passer les frontières de France. Je fais la guerre aux soldats et non aux citoyens français. Ceux-ci continueront, par conséquent, à jouir d'une complète sécurité pour leurs personnes et leurs biens, aussi longtemps qu'ils ne me priveront eux-mêmes, par des entreprises hostiles contre les troupes allemandes, du droit de leur accorder ma protection.'<sup>1</sup>

It will be observed that 'sécurité pour leurs personnes *et leurs biens*' is conditioned upon abstinence from hostile enterprises. If, however, there was any ambiguity in this language, there was none in that used by Dr. Busch, with Bismarck's approval, in the *Moniteur*.<sup>2</sup>

'The King said at the beginning of the war in his proclamation that he was going to wage it only against the armed power of France, not against its peaceful citizens. From these words it has been attempted to infer that we ought only to have fought against the Empire and not against the Republic, in presence of which it is supposed to have been our duty to lay down our arms. As for the peaceful citizens, the *Franctireurs*, and those who support them, are certainly not peaceable citizens. All the authorities on the law of nations, from Vattel to Bluntschli and Haller, agree in this, that the considerate treatment of the peaceable population rests on the assumption that an absolutely distinct line is drawn between soldiers and civilians, and that the civilian abstains from those hostile acts which are the duty of soldiers. What the soldier must do the civilian must not do, and if he takes hostile action against the foreign troops invading his country, *he loses the rights of a civilian without acquiring those of the soldier*. When the soldier is no longer in a condition to do injury, he can demand to be treated mercifully, but the civilian who kills without being bound to do so, and *who thereby wipes out the line of demarcation, cannot be disarmed except by death*. The condition of a prisoner of war does not exist for him; *he must be annihilated in the interests of humanity*.'

When it is added that German practice did not lag far behind this statement of her strict rights, dispassionate observers will readily conceive what system of repression would have commended itself to Prussian commanders against a Boer who had violated a spontaneously taken oath of neutrality.

<sup>1</sup> *Bismarck in the Franco-German War*, by Dr. Busch, vol. ii. p. 139.

<sup>2</sup> *Loc. cit.*, p. 206.

APPENDIX B  
(*Extract from the Naval Prize Bill*)

A  
B I L L

TO

Consolidate, with Amendments, the Enactments  
relating to Naval Prize of War.

WHEREAS at the Second Peace Conference held at the Hague in the year nineteen hundred and seven a Convention, the English translation whereof is set forth in the First Schedule to this Act, was drawn up, but it is desirable that the same should not be ratified by His Majesty until such amendments have been made in the law relating to naval prize of war as will enable effect to be given to the Convention:

And whereas for the purpose aforesaid it is expedient to consolidate the law relating to naval prize of war with such amendments as aforesaid and with certain other minor amendments:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART III.

INTERNATIONAL PRIZE COURT.

23.—(1) In the event of an International Prize Court being constituted in accordance with the said Convention or with any Convention amending the same (hereinafter referred to as the International Prize Court), it shall be lawful for His Majesty from time to time to appoint a judge and deputy judge of the court.

Appointment of British judge and deputy judge of International Court. [See 39 & 40 Vict. c. 59. s. 6.]

(2) A person shall not be qualified to be appointed by His Majesty a judge or deputy judge of the court unless he has been,

<sup>1</sup> It must be noted that this Bill is, of course, subject to any amendments which may be made.

Y



at or before the time of his appointment, the holder for a period of not less than two years, of some one or more of the offices described as high judicial offices by the Appellate Jurisdiction Act, 1876, as amended by any subsequent enactment.

Payment of contribution towards expenses of International Prize Court.

24. *Any sums required for the payment of any contribution towards the general expenses of the International Prize Court payable by His Majesty under the said Convention shall be charged on and paid out of the Consolidated Fund and the growing proceeds thereof.*

Appeals to International Prize Court.

25. In cases to which this Part of this Act applies, an appeal from the Supreme Prize Court shall lie to the International Prize Court.

Transfer of cases to the International Prize Court.

26. If in any case to which this Part of this Act applies final judgment is not given by the prize court, or on appeal by the Supreme Prize Court, within two years from the date of the capture, the case may be transferred to the International Prize Court.

Rules as to appeals and transfers to International Prize Court.

27. His Majesty in Council may make rules regulating the manner in which appeals and transfers under this Part of this Act may be made and with respect to all such matters (including fees, costs, charges, and expenses) as appear to His Majesty to be necessary for the purpose of such appeals and transfers, or to be incidental thereto or consequential thereon.

Enforcement of orders of International Prize Court.

28. The High Court and every prize court in a British Possession shall enforce within its jurisdiction all orders and decrees of the International Prize Court in appeals and cases transferred to the court under this Part of this Act.

Application of Part III.

29. This Part of this Act shall apply only to such cases and during such period as may for the time being be directed by Order in Council, and His Majesty may by the same or any other Order in Council apply this Part of this Act subject to such conditions, exceptions and qualifications as may be deemed expedient.

#### PART VII.

##### MISCELLANEOUS PROVISIONS.

Power to make Orders in Council.  
[27 & 28  
Vict. c. 25.  
ss. 53, 54.]

46.—(1) His Majesty in Council may from time to time make such Orders in Council as seem meet for the better execution of this Act.

(2) Every Order in Council under this Act shall be notified in the *London Gazette*, and shall be laid before both Houses of Parliament within thirty days after the making thereof, if Parliament is then sitting, and, if not, then within thirty days after the next meeting of Parliament, and shall have effect as if enacted in this Act.

## SCHEDULES

### FIRST SCHEDULE

#### CONVENTION RELATIVE TO THE ESTABLISHMENT OF AN INTERNATIONAL PRIZE COURT

##### PART I.

##### GENERAL PROVISIONS.

###### *Article 1.*

The validity of the capture of a merchant ship or its cargo is decided before prize courts in accordance with the present Convention when neutral or enemy property is involved.

###### *Article 2.*

Jurisdiction in matters of prize is exercised in the first instance by the prize courts of the belligerent captor.

The judgments of these courts are pronounced in public or are officially notified to parties concerned who are neutrals or enemies.

###### *Article 3.*

The judgments of national prize courts may be brought before the International Prize Court—

- (1) When the judgment of the national prize courts affects the property of a neutral power or individual ;
- (2) When the judgment affects enemy property and relates to—
  - (a) cargo on board a neutral ship ;
  - (b) an enemy ship captured in the territorial waters of a neutral power, when that power has not made the capture the subject of a diplomatic claim ;
  - (c) a claim based upon the allegation that the seizure has been effected in violation, either of a conventional stipulation in force between the belligerent powers, or of an enactment issued by the belligerent captor.

The appeal against the judgment of the national court can be based on the ground that the judgment was wrong either in fact or in law.



*Article 4.*

An appeal may be brought—

- (1) By a neutral power, if the judgment of the national tribunals affects its property or the property of its subjects or citizens (Article 3 (1)), or if the capture of an enemy vessel is alleged to have taken place in the territorial waters of that power (Article 3 (2) (b));
- (2) By a neutral individual, if the judgment of the national court affects his property (Article 3 (1)), subject, however, to the reservation that the power to which he belongs may forbid him to bring the case before the court, or may itself undertake the proceedings in his place;
- (3) By an individual subject or citizen of an enemy power, if the judgment of the national court affects his property in the cases referred to in Article 3 (2), except that mentioned in paragraph (b).

*Article 5.*

An appeal may also be brought on the same conditions as in the preceding article, by persons belonging either to neutral states or to the enemy, deriving their rights from and entitled to represent an individual qualified to appeal, and who have taken part in the proceedings before the national court. Persons so entitled may appeal separately to the extent of their interest.

The same principle applies in the case of persons belonging either to neutral states or to the enemy, who derive their rights from and are entitled to represent a neutral power the property of which was the subject of the decision.

*Article 6.*

When, in accordance with the above Article 3, the International Court has jurisdiction, the national courts cannot deal with a case in more than two instances. The municipal law of the belligerent captor shall decide whether the case may be brought before the International Court after judgment has been given in first instance or only after an appeal.

If the national courts fail to give final judgment within two years from the date of capture, the case may be carried direct to the International Court.

*Article 7.*

If a question of law to be decided is covered by a treaty in force between the belligerent captor and a power which is itself, or the subject or citizen of which is, a party to the proceedings, the court is governed by the provisions of the said treaty.

In the absence of such provisions, the court shall apply the rules of international law. If no generally recognised rule exists, the court shall give judgment in accordance with the general principles of justice and equity.

The above provisions apply equally to questions relating to the order and mode of proof.

If, in accordance with Article 3 (2) (c), the ground of appeal is the violation of an enactment issued by the belligerent captor, the court shall enforce the enactment.

The court may disregard failure to comply with the procedure laid down in the legislation of the belligerent captor, when it is of opinion that the consequences of complying therewith are unjust and inequitable.

*Article 8.*

If the court pronounces the capture of the vessel or cargo to be valid, they shall be disposed of in accordance with the laws of the belligerent captor.

If it pronounces the capture to be null, the court shall order restitution of the vessel or cargo, and shall fix, if there is occasion, the amount of the damages. If the vessel or cargo have been sold or destroyed, the court shall determine the compensation to be given to the owner on this account.

If the national prize court pronounced the capture to be null, the court can only be asked to decide as to the damages.

*Article 9.*

The contracting powers undertake to submit in good faith to the decisions of the International Prize Court, and to carry them out with the least possible delay.

PART II.

CONSTITUTION OF THE INTERNATIONAL PRIZE COURT.

*Article 10.*

The International Prize Court is composed of judges and deputy judges, who will be appointed by the contracting powers, and must all be jurists of known proficiency in questions of international maritime law, and of the highest moral reputation.

The appointment of these judges and deputy judges shall be made within six months after the ratification of the present Convention.

*Article 11.*

The judges and deputy judges are appointed for a period of six



years, reckoned from the date on which the notification of their appointment is received by the administrative council established by the Convention for the pacific settlement of international disputes of the 29th July 1899. Their appointments can be renewed.

Should one of the judges or deputy judges die or resign, the same procedure is followed in filling the vacancy as was followed in appointing him. In this case, the appointment is made for a fresh period of six years.

*Article 12.*

The judges of the International Prize Court are all equal in rank and have precedence according to the date on which the notification of their appointment was received (Article 11, paragraph 1), and if they sit by rota (Article 15, paragraph 2), according to the date on which they entered upon their duties. When the date is the same, the senior in age takes precedence.

The deputy judges when acting are in the same position as the judges. They rank, however, after them.

*Article 13.*

The judges enjoy diplomatic privileges and immunities in the performance of their duties and when outside their own country.

Before taking their seat, the judges must take an oath, or make a solemn affirmation before the administrative council, to discharge their duties impartially and conscientiously.

*Article 14.*

The court is composed of fifteen judges; nine judges constitute a quorum.

A judge who is absent or prevented from sitting is replaced by the deputy judge.

*Article 15.*

The judges appointed by the following contracting powers: Germany, the United States of America, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia, are always summoned to sit.

The judges and deputy judges appointed by the other contracting powers sit by rota as shown in the table annexed to the present convention; their duties may be performed successively by the same person. The same judge may be appointed by several of the said powers.

*Article 16.*

If a belligerent power has, according to the rota, no judge sitting in the court, it may ask that the judge appointed by it should take

part in the settlement of all cases arising from the war. Lots shall then be drawn as to which of the judges entitled to sit according to the rota shall withdraw. This arrangement does not affect the judge appointed by the other belligerent.

*Article 17.*

No judge may sit who has been a party in any way whatever to the sentence pronounced by the national courts, or has taken part in the case as counsel or advocate for one of the parties.

No judge or deputy judge may, during his tenure of office, appear as agent or advocate before the International Prize Court, nor act for one of the parties in any capacity whatever.

*Article 18.*

The belligerent captor is entitled to appoint a naval officer of high rank to sit as assessor, but with no voice in the decision. A neutral power which is a party to the proceedings, or the subject or citizen of which is a party, has the same right of appointment; if in applying this last provision more than one power is concerned, they must agree among themselves, if necessary by lot, on the officer to be appointed.

*Article 19.*

The court elects its president and vice-president by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are equal, by lot.

*Article 20.*

The judges of the International Prize Court are entitled to travelling allowances in accordance with the regulations in force in their own country, and in addition receive, while the court is sitting or while they are carrying out duties conferred upon them by the court, a sum of 100 Netherland florins per diem.

These payments are included in the general expenses of the court dealt with in Article 47, and are paid through the International Bureau established by the Convention of the 29th July 1899.

The judges may not receive from their own Government or from that of any other power any remuneration in their capacity of members of the court.

*Article 21.*

The International Prize Court sits at the Hague and may not, except in circumstances beyond its control, be transferred elsewhere without the consent of the belligerents.



*Article 22.*

The Administrative Council fulfils the same functions with regard to the International Prize Court as with regard to the Permanent Court of Arbitration, but only representatives of contracting powers shall be members of it.

*Article 23.*

The International Bureau acts as a registry to the International Prize Court and shall place its offices and staff at the disposal of the Court. It has the custody of the archives and carries out the administrative work.

The Secretary-General of the International Bureau acts as registrar.

The necessary secretaries to assist the registrar, translators and shorthand writers are appointed and sworn in by the Court.

*Article 24.*

The Court determines which language it shall use and the languages the employment of which shall be authorised before it.

The official language, however, of the national courts which have had cognisance of the case may always be employed before the court.

*Article 25.*

Powers which are concerned in a case may appoint special agents to act as intermediaries between themselves and the court. They may also engage counsel or advocates to defend their rights and interests.

*Article 26.*

A private person concerned in a case will be represented before the court by an attorney, who must be either an advocate qualified to plead before a Court of Appeal or a High Court of one of the contracting states or a lawyer practising before a similar court, or lastly, a professor of law at one of the higher teaching centres of those countries.

*Article 27.*

For the service of all notices, in particular on the parties, witnesses or experts, the court may apply direct to the Government of the state on the territory of which the service is to be carried out. The same principle applies in the case of steps being taken to procure evidence.

Requests for this purpose are to be executed so far as the means at the disposal of the power applied to under its municipal law, allow. They cannot be rejected unless the power in question

considers them calculated to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The court is equally entitled to act through the power within the territory of which it is meeting.

Notices to be given to parties in the place where the court sits may be served through the International Bureau.

### PART III.

#### PROCEDURE IN THE INTERNATIONAL PRIZE COURT.

##### *Article 28.*

An appeal to the International Prize Court is entered by means of a written declaration made in the national court which has already dealt with the case, or addressed to the International Bureau; in the latter case the appeal may be entered by telegram.

The period within which the appeal must be entered is fixed at one hundred and twenty days, counting from the day the decision is delivered or notified (Article 2, paragraph 2).

##### *Article 29.*

If the notice of appeal is entered in the national court, such court, without considering the question whether the appeal was entered in due time, will transmit within seven days the record of the case to the International Bureau.

If the notice of appeal is sent to the International Bureau, the Bureau will immediately inform the national court, when possible by telegraph. The latter will transmit the record as provided in the preceding paragraph.

When the appeal is brought by a neutral individual the International Bureau will immediately inform by telegraph the appellant's Government, in order to enable it to avail itself of the rights given by the second paragraph of Article 4.

##### *Article 30.*

In the case provided for in Article 6, paragraph 2, the notice of appeal can be addressed to the International Bureau only. It must be entered within thirty days of the expiry of the period of two years.

##### *Article 31.*

If the appellant does not enter his appeal within the period laid down in Articles 28 or 30, it shall be rejected without discussion.

Provided that if he can show that he was prevented from so



doing by circumstances beyond his control, and that the appeal was entered within sixty days after such circumstances had ceased to operate, the court may, after hearing the respondent, grant relief from the effect of the above provision.

*Article 32.*

If the appeal has been entered in time, a certified copy of the notice of appeal is forthwith officially transmitted by the court to the respondent.

*Article 33.*

If, in addition to the parties who are before the court, there are other parties concerned who are entitled to appeal, or if, in the case referred to in Article 29, paragraph 3, the Government which has received notice of an appeal has not announced its decision, the court, before dealing with the case, will await the expiry of the period laid down in Articles 28 or 30.

*Article 34.*

The procedure before the international court comprises two distinct phases: the written pleadings and oral discussions.

The written pleadings consist of the deposit and exchange of cases, counter-cases, and, if necessary, of replies, of which the order is fixed by the court, as also the periods within which they must be delivered. The parties annex thereto all papers and documents of which they intend to make use.

A certified copy of every document produced by one party must be communicated to the other party through the medium of the court.

*Article 35.*

After the close of the pleadings, a public sitting is held on a day fixed by the court.

At this sitting the parties state their view of the case both as to the law and as to the facts.

The court may, at any stage of the proceedings, suspend the speeches of counsel, either at the request of one of the parties, or on their own initiative, in order that supplementary evidence may be obtained.

*Article 36.*

The international court may order the supplementary evidence to be taken either in the manner provided by Article 27, or before itself, or one or more of the members of the court, provided that this can be done without resort to compulsion or intimidation.

If steps are to be taken for the purpose of obtaining evidence by members of the court outside the territory where it is sitting, the consent of the foreign Government must be obtained.

*Article 37.*

The parties receive notice to attend every stage of the proceedings and receive certified copies of the minutes.

*Article 38.*

The discussions are under the direction of the president or vice-president, or, in case they are absent or cannot act, of the senior judge present.

The judge appointed by a belligerent party may not preside.

*Article 39.*

The discussions take place in public, subject to the right of a Government, which is a party to the case, to demand that they be held in private.

They are recorded in minutes. These minutes are signed by the president and registrar, and are the only authentic record.

*Article 40.*

If a party does not appear, despite the fact that he has been duly cited, or if a party fails to comply with some step within the period fixed by the court, the case proceeds without that party, and the court gives judgment in accordance with the material at its disposal.

*Article 41.*

The court officially notifies to the parties judgments or orders made in their absence.

*Article 42.*

The court takes into consideration, in arriving at its decision, all the facts, evidence and verbal statements.

*Article 43.*

The court considers its decisions in private and the proceedings remain secret.

All questions are decided by a majority of the judges present. If the number of judges is even and equally divided, the vote of the junior judge in the order of precedence laid down in Article 12, paragraph 1, is not counted.



*Article 44.*

The judgment of the court must state the reasons on which it is based. It recites the names of the judges taking part in it, and also of the assessors, if any ; it is signed by the president and registrar.

*Article 45.*

The judgment is delivered in open court, the parties concerned being present or duly summoned to attend ; the judgment is officially communicated to the parties.

When this communication has been made, the court transmits to the National Prize Court the record of the case, together with copies of the various decisions arrived at and of the minutes of the proceedings.

*Article 46.*

Each party pays its own costs.

The party against whom the court decides bears, in addition, the costs of the trial, and also pays one per cent. of the value of the subject-matter of the case as a contribution to the general expenses of the International Court. The amount of these payments is fixed in the judgment of the court.

If the appeal is brought by an individual, he will furnish the International Bureau with security to an amount fixed by the Court, for the purpose of guaranteeing the eventual fulfilment of the two obligations mentioned in the preceding paragraph. The court is entitled to postpone the opening of the proceedings until the security has been furnished.

*Article 47.*

The general expenses of the International Prize Court are borne by the contracting powers in proportion to their share in the composition of the court as laid down in Article 15 and in the annexed table. The appointment of deputy judges does not involve any contribution.

The administrative council applies to the powers for the funds requisite for the working of the court.

*Article 48.*

When the court is not sitting, the duties conferred upon it by Article 32, Article 34, paragraphs 2 and 3, Article 35, paragraph 1, and Article 46, paragraph 3, are discharged by a delegation of three judges appointed by the court. This delegation decides by a majority of votes.

*Article 49.*

The court itself draws up its own rules of procedure, which must be communicated to the contracting powers.

It will meet to draw up these rules within a year of the ratification of the present Convention.

*Article 50.*

The court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated, through the medium of the Netherland Government, to the contracting powers, which will confer together as to the measures to be adopted.

## PART IV.

## FINAL PROVISIONS.

*Article 51.*

The present Convention does not apply as of right except when the belligerent powers are all parties to the Convention.

It is further understood that an appeal to the International Prize Court can only be brought by a contracting power or the subject or citizen of a contracting power.

An appeal is only admitted under Article 5 when both the owner and the person entitled to represent him are equally contracting powers or the subjects or citizens of contracting powers.

*Article 52.*

The present Convention shall be ratified and the ratifications shall be deposited at the Hague as soon as all the powers mentioned in Article 15 and in the table annexed are in a position to do so.

The deposit of the ratifications shall take place, in any case, on the thirtieth June, Nineteen hundred and nine, if the powers which are ready to ratify furnish nine judges and nine deputy judges to the court, duly qualified to constitute a court. If not, the deposit shall be postponed until this condition is fulfilled.

A minute of the deposit of the ratifications shall be drawn up, of which a certified copy shall be forwarded, through the diplomatic channel, to each of the powers referred to in the first paragraph.

*Article 53.*

The powers referred to in Article 15 and in the table annexed



are entitled to sign the present Convention up to the date of the deposit of the ratifications contemplated in paragraph 2 of the preceding Article.

After this deposit, they can at any time accede to it, purely and simply. A power wishing to accede, notifies its intention in writing to the Netherland Government, transmitting to it at the same time the act of accession, which shall be deposited in the archives of the said Government. The latter shall send, through the diplomatic channel, a certified copy of the notification and of the act of accession to all the powers referred to in the preceding paragraph, informing them of the date on which it has received the notification.

*Article 54.*

The present Convention shall come into force six months from the deposit of the ratifications contemplated in Article 52, paragraphs 1 and 2.

The accessions shall take effect sixty days after the notification of such accession has been received by the Netherland Government, or as soon as possible on the expiry of the period contemplated in the preceding paragraph.

The International Court shall, however, have jurisdiction to deal with prize cases decided by the national courts at any time after the deposit of the ratifications or of the receipt of the notification of the accessions. In such cases, the period fixed in Article 28, paragraph 2, shall only be reckoned from the date when the Convention comes into force as regards a power which has ratified or acceded.

*Article 55.*

The present Convention shall endure for twelve years from the date at which it comes into force, as determined by Article 54, paragraph 1, even for the powers acceding to it subsequently.

There shall be tacit prolongation for the term of six years unless this Convention is denounced.

Denunciation must be notified in writing, one year at least before the expiry of each of the periods mentioned in the two preceding paragraphs, to the Netherland Government, which will inform all the other contracting powers.

The denunciation shall only operate in respect of the denouncing power. The Convention shall remain in force in the case of the other contracting powers, provided that their share in the appointment of judges be still sufficient to allow the work of the court to be discharged by nine judges and nine deputy judges.

*Article 56.*

In case the present Convention is not in operation as regards all the powers referred to in Article 15 and the annexed table, the Administrative Council shall draw up a list on the lines of that Article and table of the judges and deputy judges through whom the contracting powers share in the composition of the court. The times allotted by the said table to judges who are summoned to sit in rota will be redistributed between the different years of the six-year period in such a way that, as far as possible, the number of the judges of the Court in each year shall be the same. If the number of deputy judges is greater than that of the judges, the number of the latter can be completed by deputy judges chosen by lot among those powers which do not nominate a judge.

The list drawn up in this way by the Administrative Council shall be notified to the contracting powers. It shall be revised when the number of these powers is modified as the result of accessions or denunciations.

The change resulting from an accession is not made until the first January after the date on which the accession takes effect, unless the acceding power is a belligerent power, in which case it can demand to be at once represented in the court, the provision of Article 16 being, moreover, applicable if necessary.

When the total number of judges is less than eleven, seven judges form a quorum.

*Article 57.*

Two years before the expiry of each period referred to in paragraphs 1 and 2 of Article 55, any contracting power may demand a modification of the provisions of Article 15 and of the annexed table, as regards its participation in the composition of the court. The demand shall be addressed to the Administrative Council, which will examine it and submit to all the powers proposals as to the measures to be adopted. The powers shall inform the Administrative Council of their decision with the least possible delay. The result should be communicated at once, and one year and thirty days at least before the expiry of the said period of two years, to the power which made the demand.

In such circumstances, the modifications adopted by the powers shall come into force from the commencement of the fresh period.



*Annex to Article 15.*

Distribution of Judges and Deputy Judges by Countries for  
each Year of the period of Six Years.

Judges.	Deputy Judges.	Judges.	Deputy Judges.
FIRST YEAR.		FOURTH YEAR.	
1. Argentina .	Paraguay.	1. Brazil .	Guatemala.
2. Colombia .	Bolivia.	2. China .	Turkey.
3. Spain .	Spain.	3. Spain .	Portugal.
4. Greece .	Roumania.	4. Peru .	Honduras.
5. Norway .	Sweden.	5. Roumania .	Greece.
6. Netherlands	Belgium.	6. Sweden .	Denmark.
7. Turkey .	Persia.	7. Switzerland	Netherlands.
SECOND YEAR.		FIFTH YEAR.	
1. Argentina .	Panama.	1. Belgium .	Netherlands.
2. Spain .	Spain.	2. Bulgaria .	Montenegro.
3. Greece .	Roumania.	3. Chile .	Nicaragua.
4. Norway .	Sweden.	4. Denmark .	Norway.
5. Netherlands	Belgium.	5. Mexico .	Cuba.
6. Turkey .	Luxemburg.	6. Persia .	China.
7. Uruguay .	Costa Rica.	7. Portugal .	Spain.
THIRD YEAR.		SIXTH YEAR.	
1. Brazil .	Santo Domingo.	1. Belgium .	Netherlands.
2. China .	Turkey.	2. Chile .	Salvador.
3. Spain .	Portugal.	3. Denmark .	Norway.
4. Netherlands	Switzerland.	4. Mexico .	Ecuador.
5. Roumania .	Greece.	5. Portugal .	Spain.
6. Sweden .	Denmark.	6. Servia .	Bulgaria.
7. Venezuela .	Haiti.	7. Siam .	China.

## APPENDIX C

### THE CONTROVERSY CONCERNING THE DECLARATION OF LONDON

AT the date of writing a controversy is proceeding as to the advisability of the ratification of the Declaration of London by Great Britain, and it may perhaps be useful to summarise shortly the chief points which are urged against that document, and the answers which are made.

There are two lines of attack : one is that the Declaration sacrifices rights of vital importance to Great Britain as a belligerent : the other is that it sacrifices rights of vital importance to Great Britain as a neutral.

(1.) The first school of opponents raise the following points :—

1. That the Declaration narrows down the definition of contraband and prevents a belligerent from confiscating 'all that the facts and circumstances might show to be contraband—which must vary with time, place and conditions: which may to-day be hemp, tar, tow or tallow: to-morrow, rails, biscuits or cheese: and the day after, aeroplanes.'<sup>1</sup> 'Contraband trade by neutrals with belligerents received by the Declaration all that sympathetic consideration which the instructions had prescribed.'<sup>2</sup>

'Article 34 only allows the presumption of the prohibited destination (for conditional contraband) to exist either "if the goods are consigned to enemy authorities" to "a fortified place belonging to the enemy or other place serving as a base for the armed forces of the enemy," or else to a "trader" (falsely translated "contractor" in the English version) "established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy." If the goods are consigned (or rather addressed, the French binding text having *adresse*) otherwise than to one of the destinations enumerated, then away goes the presumption: and then the very contrary presumption is

<sup>1</sup> Mr. T. G. Bowles, *Sea Law and Sea Power*, p. 149, a book which has been much relied upon by the opponents of the Declaration from the belligerent point of view.

<sup>2</sup> *Ibid.*, p. 178.



set up and "the destination is presumed to be innocent." Still more innocent must have been those British delegates who, with all the frauds before them that were exposed by Lord Stowell, could accept this. The article is but a manual of instructions for the use of the trafficker in conditional contraband desirous to carry foodstuffs, forage, clothing, vehicles, vessels, coal, railway material or such like to the armed forces of a belligerent who is prevented by the superior naval power of his enemy from carrying them for himself.<sup>1</sup>

It is answered that the lists of absolute and conditional contraband drawn up in the Declaration substantially adopt the British view: that the right of seizing absolute contraband is untouched: that the existing British rules as to destination of conditional contraband are not altered, and goods whose destination is the armed forces of the enemy may still be seized if circumstances raise a presumption of such destination: that all that the Declaration and the Prize Court Convention do is to provide a more certain remedy for neutral individuals injured by proved breaches of international law: that the agreed free list is also in accordance with British law and provides benefits to neutrals and to non-combatants without in any way restricting what Great Britain has claimed to be the rights of belligerents: and that the whole of this objection is a complaint that the Declaration is not strict enough in presuming all supplies that come to this country in time of war to be contraband.

2. It is objected that Great Britain has abandoned the doctrine of continuous voyage in relation to conditional contraband, thereby enabling a continental belligerent to get all his supplies in through neutral ports while British warships look on helpless to prevent it, and the corresponding advantage to Great Britain of getting her supplies through neutral ports is denied her because she is an island power.

It is answered that the doctrine is extremely vexatious to neutrals where the goods in question are not exclusively suitable for warlike purposes and means the taking in for adjudication of innumerable cargoes which have no military destination: that its value to belligerents is not correspondingly great, but on the contrary is highly doubtful, as the possibility of proving military destination of such goods consigned to a neutral port is slight, and the rule can be easily evaded: that continental powers will not, in fact, require to get in much of their supplies by sea, and that the power of stopping what they get through neutral ports will have no material effect upon the fortunes of the war and will only involve

<sup>1</sup> Mr. T. G. Bowles, *Sea Law and Sea Power*, p. 181.

this country in dangerous controversies with neutrals: and that Great Britain will profit as much as any nation by the change, as goods can be consigned to neutral ports on the French, Belgian or Dutch coasts and thence brought over under convoy, it being assumed that if Great Britain has not force enough left to protect vessels on as short a voyage in home waters it will be useless for her to continue the war.

3. It is objected to the lists of contraband that contraband is 'incapable of being thus listed. It depends on the circumstances of time, place and destination. . . . To make exclusive hard-and-fast lists and to declare that nothing outside them shall ever at any time or place, or under any circumstances, be contraband at all is most unduly to tie the hands of the belligerent—especially of the stronger belligerent and therefore most especially of Great Britain—in preventing such trade with the enemy as is contraband.'<sup>1</sup> It is further objected (in the next sentence by the same objector) that 'Articles 23 and 25 provide that anything "may be added to the list" either of absolute or of conditional contraband "by declaration" of a belligerent power, made either in war or in peace. This is one of the most monstrous and abusive of all the monstrous and abusive features of the Declaration. . . . A belligerent power is left at its own will to declare what it pleases to be contraband.'

It is answered that both the above objections are unfounded, and as they are mutually destructive they may be left to answer each other: but that it is to be observed that the Declaration does not declare that nothing outside the lists shall ever be deemed contraband, but on the contrary provides for additions to the lists if circumstances render contraband articles which are now innocent: and that it does not authorise the addition of any article a belligerent pleases, but only of articles exclusively of use in war to the absolute list (if duly notified and if the International Court approves) and of articles which may be of use in war to the conditional list (subject to the same proviso).

4. It is objected that by allowing the neutral to escape search by sailing under the protection of a convoy of his own state, Great Britain has abandoned a valuable right and enabled the neutral to indulge in unchecked fraud. 'The neutral vessels may be two coasting vessels under convoy of a battleship, or twenty Atlantic liners under convoy of a torpedo-destroyer, the rule is the same in both cases. One or all of the convoyed vessels may be, in fact, engaged in attempting to break a blockade: in carrying troops to the enemy: it may be under the control of an enemy's agent: it may

<sup>1</sup> Mr. T. G. Bowles, *Sea Law and Sea Power*, p. 183.



be a neutral collier chartered by the enemy's fleet and full of coal for that fleet: it may even be an enemy ship falsely pretending to be a neutral and possibly destined to be later "transformed" into an enemy warship: it may be actually engaged in giving hostile assistance in one way or another to the enemy. And the warship meeting the convoy may either have absolute information to this effect or may see manifest signs of it. All that matters not. The captain of the warship may not search, may not visit, may not ask a question or look at a paper.<sup>1</sup>

It is answered that there is no absolute right of freedom from search of convoyed ships: that on reasonable suspicion the officer of the convoy must make the necessary search, and that it is recommended that this be done in the presence of an officer of the belligerent, a recommendation which will always be followed by any neutral state which does not want to be involved in the war: that convoys in modern warfare will be rare as it is highly inconvenient to keep together a fleet of steamships of the varying speeds of modern merchant vessels: that neutral states will only in the most exceptional circumstances detail warships for purposes of convoy, thereby taking upon themselves a national responsibility for the *bona fides* of the cargoes of individual traders: and that in such exceptional circumstances (e.g., if, while Great Britain is neutral, a belligerent seizes and sinks all vessels in reckless disregard of the provisions of the Declaration) this right of convoy may prove of great value. It is added that the probability of a battleship being told off to convoy two coasting vessels, or a torpedo-destroyer to convoy twenty Atlantic liners, is so remote as to be almost negligible: that if vessels are attempting to break blockade no question of protection by convoy arises: and that in the other cases suggested, the facts would be so obvious and flagrant that no honest neutral could be deceived, and in the case of a dishonest one the obligation to respect the right of convoy disappears at once.

5. It is objected that Great Britain has abandoned the right of seizing blockade-runners at any point on the journey out and home; this being described as a 'serious and disastrous' surrender.

It is answered, that though in theory Great Britain insisted upon the right of seizing a blockade-runner at any point on her outward or homeward journey, in fact her cases show that practically all seizures were made in the neighbourhood of the blockading force: that though there are instances where the capture was made at some distance and by a vessel other than a vessel of the blockading force, the new rule will make little, if any, difference in practice as a vessel

<sup>1</sup> Mr. T. G. Bowles, *Sea Law and Sea Power*, p. 185.

may be seized in the area of operations of the blockading force, or so long as she is pursued by a ship of the blockading force, and with modern cruisers the area may be very large (it may even be 1000 miles), and the pursuit will usually be short and successful: that in view of the speed of modern cruisers, blockade running will be far more dangerous than it was when all ships, being sailing ships, were comparatively on an equality: that the rule against capture outside the area applies, of course, only to neutral vessels: that the concession by great Britain is balanced by a far more important concession from France, who had hitherto insisted on but now abandoned the principle of '*notification speciale*' in all cases: and that for the rest the rules as to blockade are substantially an enunciation of the British law on the subject.

6. It is objected that Great Britain has made a disastrous surrender by abandoning the right of seizing enemy despatches on board neutral vessels. The treacherous and dangerous nature of such 'unneutral service' was emphasised by Lord Stowell. This objection is not so much to the Declaration of London as to Article 1 of Convention XI. of 1907, which gave protection to postal correspondence, official or private, on board a neutral or enemy ship.

It is answered that this only carries out the principle, which is a reasonable concession to modern commerce, that only a very strong necessity to the belligerent ought to be allowed to justify the delaying or seizure of mail vessels carrying correspondence dealing with the ordinary business affairs of neutrals and non-combatants: that to allow the right would be to authorise a prolonged search of every mail vessel on the ocean: that so far from the right being of importance to the belligerent, it is of very little use to him, as belligerents will carry on their important communications by cable or wireless telegraphy, or capture can very easily be evaded by having the despatches addressed to an innocuous address or carried by a private individual, or carried in duplicate in two or more vessels, one of which is sure to get through: and that the principle of immunity has already been adopted in treaties by Great Britain and other nations and may quite reasonably be extended. To which is added, that the advantage to British mail lines, when neutral, of freedom from a search of all their mail bags is obvious and overwhelming: while Article 45 of the Declaration, with its commentary, covers sufficiently the case of a vessel which has specially undertaken a voyage, or gone out of her usual course, to transmit intelligence to the enemy.

7. It is objected that Great Britain has surrendered a valuable right in relation to the transport of enemy troops in agreeing that a vessel is to go free unless 'on a voyage specially undertaken with



a view to the transport of individual passengers who are embodied in the armed forces of the enemy.' 'Both conditions must be present. If the individuals are not "embodied" he may transport them even on a voyage specially undertaken with that view. Or even if the individuals are embodied, then he may transport them if only he is not on a voyage specially taken with that purpose. Nay, he may go further. He may "transport a military detachment of the enemy, or one or more persons who in the course of the voyage directly assist the operations of the enemy," provided that this is not done "to the knowledge of either the owner, the charterer or the master": a provision with which the merest tyro in neutral frauds can comply.'

It is answered that much the same thing applies here as in the case of dispatches, and the advantage to the belligerent must be very clear to counterbalance the disadvantage to the neutral of having every mail ship with passengers on board searched for passengers who may by the law of their country be liable to military service: that the persons referred to will have returned to their own country in large numbers before the outbreak of war: that in any event the numbers of Germans or French in America who return to serve in the German or French army will not have any appreciable effect upon the fortunes of this country in a naval war with France or Germany: that no captain of a neutral liner can be expected to know, in the case of individual passengers, whether they are embodied or not: that the alternative is to allow the belligerent to take the vessel into one of his own ports for adjudication, if it has any of the other belligerent's male subjects of military age on board, or to allow the belligerent to remove every male subject of military age of the other belligerent from every neutral liner he meets. It is said, therefore, that the provisions of the Declaration are quite reasonable in providing that no liner can be delayed for such a purpose unless she specially undertook the voyage (or, as the report explains, turned aside from her course, or did something outside her usual service as a passenger steamer) for the purpose of carrying individuals embodied in the armed forces of one of the belligerents. A vessel not a regular passenger liner would almost certainly fail to satisfy this condition. In the more serious case of there being a substantial military detachment on board, or persons who in the course of the voyage directly assist the enemy's operations, the vessel may be seized, and it is almost inconceivable that the master, the owner and the charterer will all be able to satisfy any court that they knew nothing about it.

<sup>1</sup> Mr. T. G. Bowles, *Sea Law and Sea Power*, p. 196.

8. It is objected that the rules as to transfer of an enemy vessel to a neutral flag are all in favour of the neutral : that all the circumstances ought to be open to examination, and there ought to be unfettered power to prove that a transfer is dishonest, whereas ' Articles 55 and 56 pile up foregone presumptions which decide the case upon arbitrarily-chosen facts before all the circumstances can be even so much as alleged. Thus by Article 55, "where the transfer was effected more than thirty days before the outbreak of hostilities there is an absolute presumption that it is valid if it is unconditional, complete and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of nor the profits arising from the employment of the vessel remain in the same hands as before the transfer." In other words, however suspicious the circumstances may be, however strong the circumstantial evidence against the ship alleged to have been transferred, she is absolutely presumed innocent unless the captor (on whom lies the burden of proof), with his hands full of circumstantial evidence sufficient to hang a score of men, is able to add thereto conclusive proof that the transfer was either not unconditional, or complete, or in conformity with the law of the two foreign countries concerned, or of the effect described." Similar objection is made to the remainder of the Articles in question, and it is urged that the system of presumption is equally unfair to both parties because ' Article 56 declares that "there is an absolute presumption that a transfer is void when made after the outbreak of hostilities" : "if made during a voyage or in a blockaded port," or "if a right to repurchase is reserved" : or "if the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have not been fulfilled."'<sup>1</sup>

It is answered that the whole of this objection is based on a misunderstanding of the meaning of the Articles criticised, which are merely a reduction of the British principles to definite rules. (The general effect of these rules will be found set out on p. 175.) The attack, for instance, upon the absolute presumption in Article 55 shows a lack of appreciation of the fact that this presumption is conditional upon the transfer being unconditional, complete, legal and without retention of control or profits by the transferor. The passage above quoted about a captor being helpless though possessed of evidence sufficient to hang a score of men, is meaningless : such evidence would show that the transfer was not complete, or that control or profits were retained, and the irrebuttable presumption would never arise. As to the rules relative to transfer after the outbreak of war, which are said to be unfair to the captured, they

<sup>1</sup> Mr. T. G. Bowles, *Sea Law and Sea Power*, pp. 198, 199.



are merely a statement of the effect of the British cases. On this point France, Russia and Germany had supported the rule that any transfer was invalid after the outbreak of the war if the buyer could have had knowledge of such outbreak: but they all conceded the reasonableness of the rule adopted that 'the transfer of an enemy vessel to a neutral flag, effected after the outbreak of hostilities, is void, unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel as such is exposed.' The difference will in practice be but slight: but all nations, including Great Britain, have always viewed with the utmost suspicion transfers after war has broken out. And such suspicion is fully justified, for in practically every case such transfers will only be effected in order to escape the rule that all enemy property is subject to capture.

9. It is objected that no agreement was arrived at on the question of the determination of the enemy character of the owner of goods: that the British rule of domicile has been abandoned, and this unsettles the whole matter, and that the International Prize Court is certain to decide the point against Great Britain.

It is replied that this is a minor question which will in no way affect the operations of belligerents: it will only arise when goods, otherwise open to suspicion, are brought in for adjudication and the court has to deal with the claim of the owner. The principle of domicile was not abandoned by Great Britain: the nations were almost equally divided on the subject, and there is no certainty that the British view will not be taken by the International Court, as it is on the whole reasonable that a man domiciled in a country should be treated in the same way as a subject of that country: and that even if our view is not taken it will not be a serious matter, as it is merely a question of the payment of compensation to an individual, which will be worth paying in the future if it frees us from the risk of trouble with neutrals in the present. Any decision on the subject will 'cut both ways,' and be as much to the advantage of British subjects as it is to their disadvantage.

Generally it is said against the Declaration that it is a disastrous surrender of our belligerent rights at sea: that it is the final triumph of a conspiracy against British sea power: that it carried out the instructions given by the Foreign Office 'to abandon at once some of the most vital principles of international law, as hitherto declared and enforced by British Prize Courts,'<sup>1</sup> and that 'in all important respects, and wherever important alterations were made by the Declaration, they were made to the injury of Great Britain and

<sup>1</sup> Mr. T. G. Bowles, *Sea Law and Sea Power*, p. 146.

to the lessening of her naval power in war while land power was left unaffected or was even enlarged.'<sup>1</sup>

It is replied that the greater part of the Declaration is merely a statement of the existing practice in accordance with British principles: that some valuable concessions were obtained to British views: that the points conceded by Great Britain prove on examination to be of little importance to a belligerent and the concessions were called for by the alteration in the conditions of modern trade and will prove of great advantage to British shippers and shipowners when they are neutral: and that the real basis of the objection to the Declaration is the idea that this country is entitled to carry on war without observing any rules at all. This idea involves as its correlative (with the repudiation of the Declaration of Paris) the unfettered right of any other nation to revive against us privateering and paper blockade and to seize everything, contraband or non-contraband, coming to this country in neutral as well as British ships: and such a policy, if adopted by this country, would deprive of all moral weight any protest made by Great Britain when neutral against the most extravagant actions of belligerents.

(2.) The other school of opponents approach the Declaration from the neutral point of view and the main objections are as follows:—

1. It is objected that the Declaration places food stuffs in the list of conditional contraband, thereby acknowledging that they are properly so placed. 'The effect of this admission is very serious. In the event of this country being engaged in war food stuffs would certainly be treated by the opposing force as conditional contraband. Food stuffs have no doubt been heretofore treated as contraband when sent into a besieged or blockaded place, but this is indefinitely extended by the addition of the ambiguous phrase, "or other place serving as a base." The Drafting Committee of the Conference point out that the destination which renders ship and cargo conditional contraband "may be a fortified place belonging to the enemy, or a place used as a base, whether of operations or supply, for the armed forces of the enemy." There seems practically no doubt that, in the event of war, every seaport in the United Kingdom could be treated by Prize Courts as a base of supply for the armed forces of the country, with the result that all food stuffs coming to the United Kingdom might become liable to capture as contraband.'<sup>2</sup>

It is replied that under the existing practice Great Britain has

<sup>1</sup> Mr. T. G. Bowles, *Sea Law and Sea Power*, p. 205.

<sup>2</sup> Letter from Glasgow Chamber of Commerce to Sir Edward Grey, 10th August 1910; *Parl. Papers*, Misc., No. 4, 1910, p. 1.



for more than a hundred years treated food as conditional contraband, while other nations, such as Russia and France, have treated it as absolute contraband, and even the British decisions of a hundred years ago show some uncertainty on the point, and in 1793 Great Britain acted upon the view that it was absolute contraband. The objection really sets out what the danger is under the existing practice. This danger will always exist when we are at war, whether the Declaration be ratified or not: the Declaration is at any rate an important concession from powers which have claimed the right of treating food as absolute contraband. It is not the case that food stuffs have been treated as contraband when sent to a 'besieged or blockaded port': in such a case no question of contraband arises, for everything is seizable on the establishment of an effective siege or blockade, and the occurrence of the words, 'besieged or blockaded place' in treaties is mere surplusage, due to the fact that those treaties were drawn up at a time when the doctrine of contraband was in a state of imperfect development. The real test is in the words of Lord Stowell, 'whether the articles were going with a highly probable destination to military use,' and of this destination 'the nature and quality of the port to which the articles were going is not an irrational test.' No precise definition of places was attempted, but by way of example was given the case of the port being in its great predominant character 'a port of naval military equipment.' There is thus under the existing law no security that (as railways have introduced a new element into war) a port connected by a railway with a naval or military base will not be treated as raising the presumption (for it is only a rebuttable presumption) that the goods have a naval or military destination. While we are neutral the powers making the wider claim have, in fact, acted, and almost certainly will act, upon this presumption, even if they do not declare food absolute contraband, and our only remedy will be diplomatic representations which may or may not succeed, or war which, being a remedy worse than the disease, has not been and is not likely to be resorted to by a modern commercial nation for the recovery of damages for individuals. With the institution of the International Prize Court those individuals will be able to appeal from the belligerent prize court to a court containing a British judge and a majority of neutrals, administering a code by which it is agreed that food shall never be treated as absolute contraband, and that the presumption of its being contraband does not arise unless it is consigned to a fortified place of the enemy, or a place used as a base for armed forces, *i.e.*, as a base of operations or supply. And in the view of any impartial

court, and particularly of a court composed of a majority of neutrals, a 'base' must almost certainly be treated as some place from which the army or navy regularly and with some substantial degree of permanence is supplied. That is really the British rule. When, on the other hand, we are at war, the Declaration lays down the rule that we shall ourselves follow: any protest by us against violation of it will be meaningless, as we are already using all the force at our command: and Declaration or no Declaration, our food supply depends on our ability to retain command of the sea. So long as we do that we protect both British and neutral vessels: when we fail to do that it will be absurd to hope that the country, with the whole of its own merchant marine subject to capture, can survive on supplies brought in by neutrals.

2. It is objected that Article 35 makes all food seizable when destined to enemy territory, and therefore places it in the category of absolute contraband. The argument is this:—the Article says, 'Conditional contraband is not liable to capture, except when found on board a vessel bound for territory belonging to or occupied by the enemy or for the armed forces of the enemy, and when it is not to be discharged in an intervening neutral port.' Therefore it *is* liable to capture when found on a vessel so bound.

It is replied that this is an obvious misunderstanding based on a confusion between the destination of the goods and the destination of the vessel. Article 35, which abolishes the doctrine of continuous voyage in respect of conditional contraband, does not extend but limits Articles 33 and 34, and only means that unless the belligerent can show that the goods are to be discharged in a port in enemy territory he cannot even raise the question whether or not the goods have an ultimate naval or military destination.

3. It is objected that the Declaration concedes the right of a belligerent warship to destroy neutral prizes. 'This is a serious departure from the practice hitherto recognised. The rule which has in the past been maintained by this country is that a neutral vessel must never be destroyed. . . . Taking the exception, contained in Article 49, as it stands, no Prize Court—national or international—would seriously challenge the discretion of the captor in reference to danger to his vessel or to the success of his operations, and the provisions of Article 51 are therefore of no value. A question might no doubt be raised as to whether the neutral vessel was liable to condemnation, but this would require to be determined subsequently in a Prize Court or in the International Court. Experience has shown the disadvantage to which neutral owners are exposed in such circumstances, and while belligerents have claimed



the right to destroy prizes, the right has never been regarded favourably. The effect of Article 49 is, however, to recognise and approve of the right, while the safeguards are, it is submitted, illusory.<sup>1</sup> 'Destruction of captured neutral merchant ships, or even of ships of doubtful character, without trial or judgment, was always forbidden by the law of nations. This Declaration by Articles 48 and 49 sweeps away all need for trial and judgment.'<sup>2</sup>

It is replied that this objection, like the last one, is based on a misunderstanding of the existing practice and a belief that a practice disapproved by Great Britain becomes thereby one which will not be followed by any nation. It is not the case that there is any law of nations forbidding the destruction of neutral prizes. The British cases<sup>3</sup> did not decide that destruction was in no circumstances justifiable, but only that compensation must in all circumstances be paid to the neutral. Other nations have claimed and exercised the right to destroy, without paying compensation; British protests have been successful in restraining the practice but not in procuring redress. When Great Britain is at war British protests will be futile and other nations will be as unwilling as we are ourselves to be dragged into war to obtain compensation to a few individuals. The Declaration involves a general admission by other powers that destruction is not permissible save in exceptional circumstances: the exceptions are limited to cases where the vessel is liable to condemnation and the belligerent is consequently destroying his own property and his chance of prize money, and where the release of the prize would involve danger to the warship or to the success of her operations. The safeguard at the time against destruction is contained in the provision that all persons on board must be placed in safety, a requirement which few belligerent cruisers will be able to carry out unless the destruction only takes place in very occasional and extreme circumstances. The security that the neutral owner will be compensated lies in the fact that the court must first be satisfied that there was exceptional danger; if there was not (and so far from the court not questioning the commander's discretion its first object is to do so), then the vessel must be compensated, whatever the degree of its guilt in the matter of contraband or breach of blockade.

4. It is objected that the Declaration contains no provision against the conversion of merchant vessels into war vessels on the high seas. 'His Majesty's Government are fully cognisant of the

<sup>1</sup> The Glasgow Chamber of Commerce to Sir Edward Grey, 10th August 1910; Misc., No. 4, 1910, Cd. 5418, p. 2.

<sup>2</sup> Mr. T. G. Bowles, *Sea Law and Sea Power*.

<sup>3</sup> E.g., the *Acteon*, the *Felicity*, the *Leucade*. See p. 306, *supra*.

great importance of this matter. In their instructions to the British delegates at the Conference they say:—"Apart from the important question of principle involved, there are two practical considerations which have chiefly weighed with His Majesty's Government in refusing to recognise the right to convert merchant vessels into ships of war on the high seas. One is the facility which such a right would give to the captain of a merchant vessel qualified to act as a warship to seize enemy or neutral ships without warning. The other is that enemy vessels under the mercantile flag, but suitable for conversion, would be able, as merchantmen, to claim and obtain in neutral ports all the hospitality and privileges which would, under the accepted rules of naval warfare, be denied to them if they were warships. Availing herself of these advantages, such a vessel, found in distant waters after the outbreak of hostilities, would be enabled to pass from one neutral port to another until she reached the particular point in her voyage where she might most conveniently be converted into a commerce destroyer." . . . Considering the large mercantile marine belonging to this country, and the extent of the jurisdiction of His Majesty's dominions, the rule contended for by the other delegates at the Conference as forming part of the existing law of nations might not be to the disadvantage of this country in the event of its being a belligerent power. On the other hand, in the event of this country being a neutral, the national mercantile marine would be exposed to very manifest danger and loss by the enforcement of the rule by belligerents.<sup>1</sup> Other critics contend that Great Britain has consented to a practice which would enable a belligerent to convert a vessel into a warship on the high seas, and by her capture and sink prizes, and reconvert her into a merchant vessel when she wanted to take in supplies at a neutral port, or saw that she was in danger of capture.

It is replied that this objection again is an objection not to the Declaration but to the existing state of the law and practice. The British Government declined to concede the right of conversion on the high seas: three other powers declined to abandon it. No agreement was reached, and consequently the position remains unchanged. There are two possible alternatives from this. Either the question of such right is outside the jurisdiction of the International Court, and consequently Great Britain is left as at present to use diplomatic protest (which has in the past proved unavailing, so far as compensation is concerned, and of doubtful value even in stopping the practice) or force (which, as already stated, a modern

<sup>1</sup> Letter from Glasgow Chamber of Commerce to Sir Edward Grey, 10th August 1910, Misc., No. 4 (1910), Cd. 5418, p. 3.



commercial nation will only in the most extreme cases use where it is only a question of damages to individuals): or the question is within the jurisdiction of the court, and as only three nations persisted in adhering to the right, any appeal to the court by a neutral (the court itself consisting of a large majority of neutrals) seems almost certain to be successful.

With regard to the more extreme case mentioned last in the above objection, it is replied that no power has put the case for conversion and reconversion so high: that no neutral would ever tolerate such a vessel in its ports, and that no belligerent would ever do anything else but destroy such a vessel: and that should captures by such a vessel ever come before the court, it is inconceivable that the right of so converting and reconverting would be allowed for a moment, as 'just and equitable,' by any court consisting, as the International Court would consist, mainly of neutrals.

5. It is objected that the Declaration sanctions the restoration of privateering, such converted vessels being in effect privateers thinly, if at all, disguised.

It is replied that this again is an objection to the existing practice, to which the Declaration makes no reference at all. All nations, including Great Britain, maintain the right of converting merchant ships into warships, and several pay subsidies to merchant lines with this object: the only dispute being as to whether such vessels can be converted on the high seas. The existing practice might, unless carefully restrained, lead to the reinstitution of privateering: but it is restrained as far as possible by Convention VII. of 1907, by which a vessel so converted must be under the direct authority, immediate control and responsibility of the power whose flag it flies, must bear the external marks of a warship, must be commanded by a duly-commissioned officer, must be manned by a crew subject to military discipline, and must observe the laws and customs of war; and such conversion must be announced as soon as possible in the list of warships. Each of these requirements distinguishes such a vessel from a privateer which was not under state control and cruised for private gain.

6. It is objected that the position of neutrals is much prejudiced by Articles 45, 46 and 47, which deal with 'unneutral service.' 'Article 47, which provides that any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel may be made a prisoner of war, even though there be no ground for the capture of the vessel, is a departure from the rule hitherto recognised. The recognition of the new rule might lead to great trouble to neutral shipowners. Any neutral ship could

be stopped by a belligerent vessel, and searched with a view of ascertaining whether any person embodied in the armed forces of the enemy happened to be on board. Considering the vast number of persons who, according to the law of Continental countries, may be considered members of the armed forces, this article would justify the removal from a British ship of almost any foreigner. Even in cases where the stoppage of the vessel was not justified the shipowner would have no claim for compensation. A mail steamer might be delayed for several hours for the purpose of making such search, which would entail serious loss.<sup>1</sup>

It is replied that this again is an objection to the existing practice which has, in fact, been quite reasonably modified in the neutral's favour by the Articles referred to. Under the existing practice there is not the slightest doubt that any neutral vessel is always bound to submit to stoppage and search with a view to the discovery on board of contraband enemy individuals or enemy dispatches. For the delay so caused such vessel never receives any compensation. With regard to dispatches, an important concession to neutral mail ships was secured by Convention XI. of 1907, without abandoning any belligerent right worth keeping: and with regard to enemy belligerent individuals the British rule at present is that such persons may not be carried by a neutral, that the ship carrying them may and should be taken in for adjudication, and that they cannot be taken by the belligerent from the vessel. This rule perhaps worked well enough when there were no large passenger liners: in modern times it would be intolerable to a neutral to have, say, the *Mauretania* taken into a French port because she carried some German officers as ordinary passengers. Consequently it is agreed by the Declaration (Article 47) that such persons may be removed from the vessel, and the vessel may be allowed to proceed: and it is to be noted that it is only persons actually embodied in the armed forces who may be so removed: the mere fact that a person on his return may be so embodied is no justification for his seizure. The new rule, therefore, is, as compared with the practice of the port, a reasonable limitation of belligerent rights in favour of the neutral. It is from the other point of view attacked as being too lenient to the neutral.<sup>2</sup>

7. It is objected that Article 63, condemning the vessel in the case of forcible resistance to stoppage and search, is an unwarranted concession to belligerents. 'What would be considered to be

<sup>1</sup> Letter from Glasgow Chamber of Commerce to Sir Edward Grey, 10th August 1910; Misc., No. 4 (1910), Cd. 5418, p. 3.

<sup>2</sup> See p. 357, *supra*.



forcible resistance is a difficult question, and will always place the British shipowner in a difficult position. He would require to establish conclusively that any resistance offered to an unreasonable demand for stoppage or search was not *par la force*.<sup>1</sup>

It is replied that so long as it is admitted that there are offences against international law which a neutral vessel may commit, the right of stoppage and search to discover whether an offence is being committed is beyond dispute: that forcible resistance is in itself as strong a proof of guilt as could be desired, and that the question whether there was forcible resistance or not is one of the simplest questions of fact which any court could have to decide. The report to Article 63 explains that a mere attempt at flight is not 'forcible resistance,' though it prevents the vessel obtaining compensation if damaged or sunk.<sup>2</sup> The Article is a simple statement of the existing law and practice.

(3.) Against the institution of the International Prize Court the following objections have been raised:—

1. That it is derogatory to the sovereignty of Great Britain to surrender the right of final decision at present vested in the British Prize Courts.

It is replied that all submissions to arbitration involve a limited surrender of sovereignty; a surrender which is, of course, made by each party to the agreement in return for a like surrender by all the other parties. The court will do something to check the extravagant pretensions of belligerents who claim to dictate to their own courts rules which make no pretence to being agreed rules of international law: a tendency to which British courts will not be liable if they act upon the principles which have been asserted by Great Britain during the last hundred years. The check will thus be greater upon the courts of other nations than upon our own.

2. It is objected that the court is a scheme devised by the Continental nations, and particularly Germany, for the purpose of hampering the operations of the British fleet and minimising the superiority of Great Britain at sea.

It is replied that the Prize Court Convention, as finally settled, was more in accordance with the British than the German draft. Great Britain was foremost in proposing its institution, though by an accident of procedure the German delegate was the first to mention the question at the Conference. It will be of value to

<sup>1</sup> Letter from Glasgow Chamber of Commerce to Sir Edward Grey, 10th August 1910, Misc., No. 4 (1910), Cd. 5418, p. 3.

<sup>2</sup> See p. 298.

neutrals, and particularly to Great Britain, by enabling their subjects to obtain damages from a court mainly composed of neutrals, in cases where at present the interests at stake are never considered of sufficient importance to justify a neutral nation joining in the war, and compensation by the slow and uncertain method of diplomacy is very seldom obtained. To Great Britain, as a belligerent, it will make little, if any, difference. The rules the court will apply, as laid down by the Declaration of London, are in the main the British rules. The concessions of belligerent rights by this country are of little importance, and would have had to be conceded in any event owing to the changed conditions of modern commerce and naval warfare: and though the existence of the court will have a beneficial effect in making belligerents more careful as to the rights of neutrals, the actual operations of naval war are not likely to be seriously affected by the prospect of judgments for damages after an interval of two years.

3. It is objected that if Great Britain is at war and her enemy violates, as against her, the rules of contraband and blockade, strong neutral nations will be debarred from protesting, as they might do at present, and will be content to await the judgment of the International Prize Court, which will give damages to neutral individuals: and thus Great Britain will be robbed of one of her chief securities against the stoppage of the whole of her supplies.

It is replied that this removal of the danger of complications with neutrals, in so far as it is effective, will be also to the advantage of this country in war. But there is no reason to suppose that if a nation so grossly and persistently violates the rules of the Declaration of London as to show an intention to be bound by no rules at all, neutrals will not interfere at once to as great an extent as they are likely to do at present. But the prospect of such neutral intervention in the war for the sake of recovering damages for individuals is not in any case very great, in view of the enormous cost of a modern war. The question cannot arise in any serious form till Great Britain has lost command of the sea; and the chance of any neutral being willing to join in the war against our victorious enemy in such a case, or of any such intervention being then able to save this country from the starvation of its population and the ruin of its industries for lack of raw material, is so slight as to be negligible.

4. It is objected that the International Court is to be bound by no law, but is to make the law as it pleases. Certain passages are quoted from the official report in support of this. The court 'is called upon to make the law, and to take into account other principles than those observed by the National Prize Court jurisdic



tion.' 'How is nationality, property, or domicile to be proved? Is it only by the ship's papers, or equally by other documents produced? We intend to leave to the court full powers of appreciation.' 'Every liberty is left to the court as to the appreciation of the various elements furnished to it to determine its conclusion. There is not here a legal system of proof.'<sup>1</sup>

It is replied that though before the Declaration of London the area in which there were no agreed rules was too wide, by that Declaration this area has been narrowed down to three points. The first of the above quotations does not refer to the whole range of the jurisdiction of the court: it only explains what is meant by saying that where there are no treaties or agreed rules the court decides on the principles of justice and equity; and it was written, of course, before the Declaration of London was drawn up. When it refers to 'other principles than those observed by the National Prize Courts,' it refers to the fact that the court will restrain the undesirable practice by which some Governments dictate rules to their Prize Courts which cannot claim to be rules of international law at all. The report points out that 'the judges of the International Court will not be obliged to render two decisions in a contrary sense in applying successively to two neutral ships seized under the same conditions the different rules made by the two belligerents.' In other words, the court must adopt a consistent system of law, and that it will do so is one of its chief advantages. The second and third of the above quotations do not refer to the law the court is to apply but only to its rules of evidence. Both are obvious truisms. The second means that on questions of fact, such as are nationality, property, or domicile, all the evidence must be taken into consideration: the third means that the court is not bound by rules of evidence (*e.g.*, as to the use of affidavits, the necessity for stamping and the like) peculiar to particular national systems of jurisprudence.

5. It is objected that foreigners cannot be relied upon to give honest decisions in any case where Great Britain is a litigant.

It is replied that a consideration of all the cases decided by The Hague Permanent Court shows that Great Britain has either won outright, or has substantially won, on every occasion on which she has appeared before that court: to which may be added her victories in the Venezuelan Boundary Case and the Behring Sea Fisheries Case. No bias has ever been shown against this country: the members of the court are men of judicial training, and any danger of national bias is reduced to a minimum by the members

<sup>1</sup> Mr. T. Gibson Bowles, *Sea Law and Sea Power*, pp. 114, 115.

of the court. British suitors, when neutrals, will at any rate have a far better chance than they would have before the court of the belligerent captor: and when Great Britain is at war the capture of property belonging to British subjects will not, except in two minor and seldom-occurring cases, come before the International Court at all.

6. That the court is composed of jurists 'drawn principally from the smaller states, such as Columbia, Paraguay, Persia, Roumania, Hayti,'<sup>1</sup> and that it is absurd to submit the decisions of British Prize Courts to the review of a tribunal so constituted.

It is replied that the court is not principally so composed, but the great powers have a permanent majority of eight judges out of a possible fifteen if the full court sits: that the smaller powers only send judges according to a fixed 'rota': that to ignore them would have been inexpedient, for it will be of advantage to bind them by the decisions of the court, and in order that they may be so bound they must be represented on that court: that the leaning of their jurists is towards neutral rights, and that their presence on the court will be of great assistance to this country when it is neutral, and will be some guarantee against the extravagant claims of any enemy when Great Britain is at war.

<sup>1</sup> Memorandum issued by the Bristol Branch of the Navy League, *Misc.*, No. 4 (1910), Cd. 5418, p. 22.





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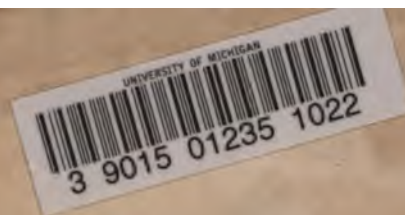


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